Supreme Court of the United States

OCTOBER TERM, 1966

No. 1080

JAMES CLEVELAND (JIMMY) BURGETT,
PETITIONER

vs.

TEXAS

ON WRIT OF CERTIORARI TO THE COURT OF
CRIMINAL APPEALS OF TEXAS

INDEX

[fol. 1]

[Caption: Omitted in printing]

[fol. 2]

IN THE 8TH JUDICIAL DISTRICT COURT OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

INDICTMENT—Filed April 7, 1965

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

THE GRAND JURORS, for the County of Hunt, State aforesaid, duly organized as such at the January Term, A.D. 1965, of the District Court of the 8th Judicial District for said County, upon their oaths in said Court present that James Cleveland (Jimmy) Burgett, on or about the 15th day of April, A.D. 1964, and anterior to the presentment of this Indictment, in the County of Hunt, and State of Texas, did then and there unlawfully, with malice aforethough, cut Weldon E. Bradley with a knife and cut and stab at the throat of the said Weldon E. Bradley with said knife, with the intent then and there to murder the said Weldon E. Bradley;

And the Grand Jurors aforesaid do further present that prior to the commission of the aforesaid offense by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged in the first paragraph of this Indictment, to-wit, on the 12th day of March, A.D. 1964, in the Criminal District Court No. 4 of Dallas County, Texas, in Cause No. E-4,825-K on the

docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of Jimmy Cleveland Burgett, was duly and legally conviced in said last-named court of a felony offense less than capital, to-wit, burglary with intent to commit theft, upon an Indictment then legally pending against him in the said last-named court and of which said last-named court then and there had jurisdiction, and said conviction last-mentioned was a final conviction and was a conviction for an offense committed by him the said James Cleveland (Jimmy) Burgett, prior to the commission of the offense hereinbefore charged against him as set forth and alleged in the first paragraph of this Indictment;

[fol. 3] And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged in the first and second paragraphs of this Indictment, to-wit, on the 17th day of June, A.D. 1961, in the Circuit Court of Maury County, Tennessee, in Cause No. 6,709 on the docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of James Burgett, was duly and legally convicted in said last-named court of a felony offense less than capital, to-wit, forgery, upon an Indictment then legally pending against him in said last-named court and of which said last-named court then and there had jurisdiction, and said conviction last-mentioned was a final conviction and was a conviction for an offense committed by him, the said James Cleveland (Jimmy)) Burgett, prior to the commission and conviction of the offense hereinbefore charged against him as set forth and alleged in the second paragraph of this Indictment, and said conviction set forth and alleged in this paragraph of this Indictment was prior to the commission of the offense charged against him as set forth and alleged in the first paragraph of this Indictment;

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the said James Cleveland (jimmy) Burgett hereinbefore charged against him as set forth and alleged

in the first and second paragraphs of this Indictment, to-wit: on the 17th day of June, A.D. 1961, in the Circuit Court of Maury County, Tennessee, in Cause No. 6,710 on the docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of James Burgett, was duly and legally conviced in said last-named court of a felony offense less than capital, to-wit, forgery, upon an Indictment then legally pending against him in said last-named court and of which said last-named court then and there had jurisdiction; and said conviction last-mentioned was a final conviction;and was a conviction [fol. 4] for an offense committed by him, the said James Cleveland (Jimmy) Burgett, prior to the commission and conviction of the offense hereinbefore charged against him as set forth and alleged in the second paragraph of this Indictment, and said conviction set forth and alleged in this paragraph of this Indictment was prior to the commission of the offense charged against him as set forth and alleged in the first paragraph of this Indictment;

And the Grand Jurors aforesaid do further present that prior to the commission of each of the aforesaid offenses by the said James Cleveland (Jimmy) Burgett hereinbefore charged against him as set forth and alleged in the first and second paragraphs of this Indictment, to-wit, on the 17th day of June,A.D 1961, in the Circuit Court of Maury County, Tennessee, in Cause No. 6,711 on the docket of said last-named court, the said James Cleveland (Jimmy) Burgett, as and under the name of James Burgett, was duly and legally convicted in said last-named court of a felony offense less than capital, to-wit, forgery, upon an Indictment then legally pending against him in said last-named court and of which said last-named court then and there had jurisdiction, and said conviction last-mentioned was a final conviction and was a conviction for an offense committed by him, the said James Cleveland (Jimmy) Burgett, prior to the commission nad conviction of the offense hereinbefore charged against him as set forthe and alleged in the second paragraph of this Indictment, and said conviction set forth and alleged in this paragraph of this Indictment was prior to the commission of the offense charged against him as

set forth and alleged in the first paragraph of this Indictment;

against the peace and dignity of the State.

/s/ BRUCE PEEK
Foreman of the Grand Jury

NO. 9632. THE STATE OF TEXAS VS. JAMES CLEVELAND (JIMMY) BURGETT INDICTMENT. OFFENSE ASSAULT WITH MALICE AFORETHOUGHT WITH INTENT TO MURDER: REPETITION OF OFFENSE. /s/ CAMERON MCKINNEY, District Attorney.

TRUE BILL /s/ BRUCE PEEK, Foreman of Grand Jury.

FILED April 7, 1965. Richard Crowell, Clerk District Court, Hunt Co., Texas.

[fol. 5]

IN THE 8TH JUDICIAL DISTRICT COURT OF HUNT COUNTY, TEXAS

No. 9,632

[Title Omitted]

STATE'S MOTION TO INSTRUCT DEFENDANT'S COUNSEL—
Filed April 29, 1965

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now the State of Texas, by and through Cameron McKinney, the duly elected, qualified and acting District Attorney in and for the 8th Judicial District of Texas, and, for and in behalf of the said State of Texas, presents this motion in said cause as follows:

1.

That the subject of matter of the amount and quantum of punishment for the subsequent conviction of a felony

offense less than capital, to-wit, the felony offense of assault with malice aforethought with intent to murder of the felony offense of assault without malice aforethought with intent to murder, under the laws of the said State of Texas, is not a subject for the jury in such cases inasmuch as the punishment therein is fixed by law and not by the jury, that any knowledge by the members of the jury panel in such cases of the terms of such punishment for said named offenses could serve no legal or useful purpose but might tend to result in a revolt by such jury against the arbitrary penalty of the law for the commission of said named offenses, and that no party has a right to brin.. before such jury a subject or matter either of law or of fact for the purpose of causing them to so rebel against the law and inducing them to refuse to follow the same.

2.

That the defendant in this said cause, James Cleveland (Jimmy) Burgett, stands charged herein with the offenses [fol. 6] above-named, to-wit, the felony offenses of assault with malice aforethought with intent to murder and assault without malice aforethought with intent to murder, and that, insofar as these charges are concerned, this cause is brought and is to be tried under the habitual criminal law of the said State of Texas.

Wherefore, it is moved by the said State of Texas that counsel and attorney for said defendant herein be instructed not to refer in any manner, directly or indirectly, during the course of the trial of this said cause, within the presence or hearing of any member of the jury or jury panel herein, to the subject or matter of the amount or quantum of the punishment that said defendant would receive as a result of a verdict herein finding said defendant guilty of either the offense of assault with malice aforethought with intent to murder or assault without malice aforethought with intent to murder charged in and by and included within the first paragraph of the indictment herein and further finding that each and all of the allegations in the second paragraph of this indictment are true and further finding that each and all of the allega-

tions in any one of paragraphs three through five of the indictment herein are true, and that said defendant be likewise instructed, and to further instruct said counsel and attorney for said defendant and said defendant that if such testimony has been raised by the evidence, then, and in that event, to so inform the Court of such fact subrosa or out of the presence or hearing of any member of said jury or jury panel and to allow the Court to rule upon the admissibility of such evidence or testimony out of the presence and hearing of said jury panel.

Respectfully submitted.

/s/ CAMERON MCKINNEY
District Attorney,
8th Judicial District of Texas
Greenville, Texas

[File Endorsement Omitted]

[fol. 9]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

DEFENDANT'S MOTION TO QUASH INDICTMENT—
Filed April 29, 1965

TO THE HONORABLE JUDGE OF SAID COURT:

I.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the first count of indictment pending against him herein for the reason that

said count is wholly insufficient in law to charge an offense against the laws of the State of Texas.

II.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the second count of indictment pending herein for the reasons that same is not sufficiently definite to apprize this defendant as to what the state will attempt to prove under said count, it is unintelligible, it is vague and indefinite as to the time of commission of the offense, the basis of the conviction in cause No. E-4,825-K, does not allege such fact or facts as would show that the conviction in cause No. E-4,825-K is an offense of like character as alleged in count one and the allegations contained in said count two are wholly insufficient under the laws of the State of Texas to charge a repetition of offense of a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant, in that no sentence is alleged which is necessary to establish a final conviction.

III.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the third count of indictment pending herein for the reasons that same are not sufficiently definite to apprise this defendant as to what the State will attempt to prove under said count, it is unintelligible, it is vague and indefinite as to the time [fol. 10] of commission of the offense, the basis of the conviction in cause No. 6,719, does not allege such fact or facts as would show that the conviction in cause No. 6,709 is an offense of like character as alleged in count one and the allegations contained in said count three are wholly insufficient under the laws of the State of Texas to charge a repetition of offense or a previous conviction for the purpose of enhancement of the penalty that might be assessed againt this defendant in that no sentence is alleged which is necessary for a conviction to be final.

IV.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the fourth count of indictment pending herein for the reasons that same is not sufficiently definite to apprise this defendant as to what the State will attempt to prove under said count, it is unintelligible, it is vague and indefinite as to the time of commission of the offense, the basis of the conviction in cause No. 6,710, does not allege such fact or facts as would show that the conviction in cause No. 6,710 is an offense of like character as alleged in count one and the allegations contained in said count four are wholly insufficient under the laws of the State of Texas to charge a repetition of offense or a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant in that no sentence is alleged which is necessary for a conviction to be final. Further, conviction on said count four is on the same day as that of count three in cause No. 6,709 and is wholly insufficient under the laws of the State of Texas for the purpose of enhancement of any penalty that might be assessed.

V.

Now comes James Cleveland (Jimmy) Burgett, defendant in the above entitled and numbered cause and excepts to and moves the court to quash the fifth count of indictment pending herein for the reasons that same is not sufficiently definite to apprise this defendant as to what the State will attempt to prove under said count, it is [fol. 11] unintelligible, it is vague and indefinite as to the time of commission of the offense, the basis of the conviction in cause No. 6,711, does not allege such fact or facts as would show that the conviction is cause No. 6,711 is an offense of like character as alleged in count one and the allegations contained in said count five are wholly insufficient under the laws of the State of Texas to charge a repetition of offense or a previous conviction for the purpose of enhancement of the penalty that might be assessed against this defendant in that no sentence is

alleged which is necessary for a conviction to be final. Further, conviction on said count five is on the same day as that of count three in cause No. 6,709 and is wholly insufficient under the laws of the State of Texas for the purpose of enhancement of any penalty that might be assessed.

WHEREFORE, premises considered, this defendant prays that each and all of the above and foregoing exceptions to and motions to quash the various counts of the indictment in this cause be each and all singularly and/or collectively sustained.

Respectfully submitted.

.....

FLOYD A. HUNTER
First Greenville National Bank Bldg.
Greenville, Texas
Attorney for Defendant

[File Endorsement Omitted]

[fol. 12]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

DEFENDANT'S MOTION FOR INSTRUCTIVE VERDICT—
Filed April 29, 1965

TO THE SAID HONORABLE JUDGE:

Now comes the defendant in the above entitled cause, at the conclusion of the State's main case and after the State has rested its main case, and no evidence having been offered by the defendant, moves the Court for an instructed verdict of not guilty;

I.

Upon the grounds that the evidence introduced by the State upon this trial of the case is wholly insufficient to sustain a conviction against the defendant of the offense charged in the indictment.

By /s/ FLOYD A. HUNTER
Attorney for Defendant
FLOYD A. HUNTER
Greenville National Bank
Bldg.
Greenville, Texas

The above and foregoing motion was presented to me and the same is by me overrulled, defendant except, signed and order filed among the papers inthis case, this the 29th dayof April, 1965.

/s/ FRANK WEAR, SR.
Judge of the District Court
Hunt County, Texas

[File Endorsement Omitted]

[fol. 14]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

COURT'S CHARGE—Filed April 29, 1965

LADIES AND GENTLEMEN OF THE JURY:

* * * *

[fol. 18] However, you are further charged, if you do not so find, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of aggravated assault.

You are further charged that if from the evidence you believe beyond a reasonable doubt that the defendant is guilty of some grade of assault, but if you have a reasonable doubt whether the offense is simple assault or aggravated assault, then, you must give the defendant the venefit of the doubt and in such case, and if you find him guilty, it could not be of a higher grade of offense than simple assault.

You are further charged that the punishment for simple assault shall be by a fine only of not less than $5.00 nor more than $25.00.

Our Statutes provide that any defendant in a criminal action shall be permitted to testify in his own behalf therein, but the failure of any defendant to testify shall not be taken as a circumstance against him, so in this case you are instructed that the fact that the defendant failed to testify in his own behalf herein, is not any evidence of his guilt , or even a circumstance tending to prove his guilt, and the jury, in their deliverations in the jury room, must not refer to,mention or discuss the failure of the defendant to so testify in this case, nor will you consider such failure to so testify for any purpose whatsoever.

You are further instructed that the State during the trial of this case offered evidence that might be considered

as tending to show the commission of other offenses prior to the 15th day of April, 1964, that all such evidence is withdrawn from you and you will not consider such evidence for any purpose whatsoever in arriving at your verdict. You should not mention or discuss in your deliverations such evidence or that portion of the indictment read to you attempting to charge such prior offenses.

You are further instructed that the indictment read to you is not evidence and shall not be considered by you as such.

* * * *

[fol. 19]

* * * *

[File Endorsement Omitted]

[fol. 20]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

JUDGMENT—Date April 29, 1965

THIS DAY this cause was called fro trial, and the State appeared by her District Attorney, and the Defendant James Cleveland (Jimmy) Burgett, appeared in person, in open Court, his counsel also being present, whereupon both parties announced ready for trial and the said Defendant James Cleveland (Jimmy) Burgett in open court, pleaded not guilty to the charge contained in the indictment herein, thereupon a jury of good and lawful men, to-wit: C.W. Cox and eleven others was duly selected, impaneled and sworn, who, having heard the indictment read, the Defendant's plea of not guilty there-

to, and having heard the evidence submitted, and having been duly charged by the Court, retired in charge of the proper officer to consider of their verdict, and afterward was brought intoopen Court by the proper officer, the Defendant and his counsel being present, and in due form of law returned into open court the following verdict, which was received by the Court and is here now entered upon the minutes of the Court, to-wit:

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

We the jury find the defendant guiltyof *assault with intent to murder with malice aforethought* as charged in the Indictment and assess his punishment at ten years in the State *Penetuary.*

/s/ C. W. Cox
Foreman

IT IS THEREFORE CONSIDERED AND ADJUDGED by the Court that the Defendant James Cleveland (Jimmy) Burgett is guilty of the offense of Assault with Malice aforethought with Intent to Murder; Repetition of Offense as found by the jury and that he be punished by confinement in the State Penitentiary for a term of not less than two (2) year nor more than Ten (10) years, and that the State of Texas do have and recover of the said Defendant James Cleveland (Jimmy) Burgett all costs in this prosecution expended, for which let execu-
[fol. 21] tion issue; and that the said Defendant be remanded to jail to await the further orders of the Court herein.

[File Endorsement Omitted]

[fol. 22]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

[Title Omitted]

SENTENCE—June 2, 1965

This day this cause being again called, the State appeared by her District Attorney, and the Defendant James Celveland (Jimmy) Burgett was brought into open Court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term. And thereupon the Defendant James Cleveland (Jimmy) Burgett, was asked by the Court whether he had anything to say why said sentence should not be pronounced against him and he answered nothing in bar thereof. Whereupon, the Court proceeded in the presence of the Defendant James Cleveland (Jimmy) Burgett to pronounce sentence against him as follows:

It is therefore pronounced and ordered by the Court, that said judgment be carried into execution in the manner prescribed by law, and that the Defendant James Cleveland (Jimmy) Burgett who has been adjudged to be guilty of Assault with malice aforethought with intent to Murder; Repetition of Offense and whose punishment has been adjudged at confinement in the penitentiary for a term of Ten (10) Years, be delivered by the Sheriff of Hunt County, Texas, immediately to the Director of Corrections or other person legally authorized to receive such convict, and the said James Cleveland (Jimmy) Burgett shall be confined in said penitentiaries for a term of not less than two (3), nor more than ten (10) years in accordance with the provisions of the law governing the penitentiaries and the Texas Department of Corrections. And the said James Cleveland (Jimmy) Burgett is remanded to jail until said Sheriff can obey the directions of this sentence. The Defendant, in open Court, having waived the ten days' time, and ask that sentence

be passed on him immediately, which was accordingly done.

FRANK WEAR, SR.
Judge

* * * *

[fol. 23]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

JURY VERDICT—Filed April 29, 1965

We the jury find the defendant guilty of *assault with intent to murder with malice aforethought* as charged in the indictment and assess his punishment at ten years in the State *penetury.*

/s/ C. W. Cox
Foreman

[File Endorsement Omitted]

[fol. 24]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

[Title Omitted]

MOTION FOR NEW TRIAL—Filed May 5, 1965

TO SAID HONORABLE COURT:

Now comes the defendant in the above cause, and files this, his motion for new trial therein, and as ground for same, says:

I.

Said verdict and judgment are contrary to the law, in that defendant was not present during the voir dire examination of the Jury Panel.

II.

The verdict rendered in said cause and the judgment entered thereon is not supported by the evidence in the case.

WHEREFORE, defendant moves and prays the Court that the verdict and judgment herein be set aside and held for naught, and that he be granted a new trial herein.

/s/ JAMES C. BURGETT
Defendant

SWORN TO AND SUBSCRIBED BEFORE ME, by James Cleveland (Jimmy) Burgett this the 5 day of May, 1965.

/s/ HOMER WACASEY
Notary Public in and for
Hunt County, Texas

[SEAL]

[File Endorsement Omitted]

[fol. 25]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

AMENDED MOTION FOR NEW TRIAL—Filed May 13, 1965

TO SAID HONORABLE COURT:

Now comes the defendant in the above entitled and numbered cause, and with leave of the Court first had, filed this his amended motion for a new trial, in lieu of his original motion heretofore filed herein, and by the same moves the Court to set aside the verdict of the jury and the judgment of the Court rendered thereon, and to grant him a new trial for the following reasons, to wit:

I.

Because the Court erred in failing to have the defendant present for the voir dire examination of the jury panel, in that all of the jury panel were examined on another trial on Monday, April 19, 1965 except three, and this defendant herein was not afforded his right of personally examining said jury panel and at no time did he personally waive or forego this right even though his court appointed attorney did examine said jury panel on April 19, 1965, and in so far as the court appointed counsel was concerned may have waived further questioning of the panel; defendant herein did not and does not now waive but rather insists on his right to be present and to pass on the qualifications and desirability of the jurors in his trial, and relies on the first clause of subdivision 1 of Article 753 of the Code of Criminal Procedure of the State of Texas.

2.

Because the Court erred in overrulling defendant's written motion to quash the indictment and in the alternative to quash those counts alleged for enhancement for lack of definiteness, clarity, vagueness, intelligibility and failure of the State of Texas to allege said counts so that defendant could establish their admissibility before they were read into the record in the presence of the jury; same reading into the record in the presence of the jury was prejudicial to defendant herein,

[fol. 26]

3.

Because the Court erred in overrulling defendant's verbal motion to quash the indictment at the conclusion of the reading of the indictment because it's reading in the presence of the jury was prejudicial to defendant herein,

4.

Because the Court erred in overrulling defendant's motion for a directed verdict of not guilty at the end of the State's main case and before the defendant had offered evidence in the case.

/s/ JAMES C. BURGETT
JAMES CLEVELAND (JIMMY) BURGETT

SUBSCRIBED AND SWORN to before me this 13 day of May, 1965.

/s/ LEROY BRIGMAN
Notary Public in and for
Hunt County, Texas

[SEAL]

[File Endorsement Omitted]

[fol. 27]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

ORDER OVERRULING MOTION FOR NEW TRIAL AND NOTICE OF APPEAL—Filed June 2, 1965

On the 2nd day of June, 1965, came on to be heard the amended motion of the defendant, James Cleveland (Jimmy) Burgett, to set aside the verdict and judgment herein rendered, and to grant him a new trial of this cause; and the State being present in court by her District Attorney, and the defendant, James Cleveland (Jimmy) Burgett, being present in court in person and by his attorney, and the Court having heard the said amended motion, and the evidence thereon submitted, is of the opinion that the same should be refused.

It is, therefore, CONSIDERED, ORDERED AND ADJUDGED by the Court that the said amended motion for new trial herein be and the same is refused, and in all things overruled.

TO WHICH ACTION, RULING AND JUDGMENT of the Court the defendant James Cleveland (Jimmy) Burgett, then and there in open court excepted, and gave notice of appeal herein to the Court of Criminal Appeals of the State of Texas, which said notice is here now entered of record.

ENTERED, this the 2nd day of June, 1965.

/s/ FRANK WEAR, SR.
Judge of the District Court
of Hunt County, Texas

[File Endorsement Omitted]

[fol. 32]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 33]

[File Endorsement Omitted]

[fol. 34]

IN THE 8TH JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

STATEMENT OF FACTS—April 29, 1965

Testimony and jproceedings before the Honorable Frank Wear, Sr., Judge of said court and a jury, in Greenville, Hunt County, Texas, on Thursday, April 29th, 1965, beginning at 10:00 A. M.

APPEARANCES:

CAMERON MCKINNEY, ESQ.,
Greenville, Texas

PAUL BANNER, ESQ.,
Greenville, Texas

SMITH GILLEY, ESQ.,
Greenville, Texas

Attorneys for the State of Texas

FLOYD A. HUNTER, ESQ.,
Greenville, Texas

Attorney for the Defendant.

[fol. 35] MR. WELDON E. BRADLEY, A WITNESS FOR THE STATE, after first being sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

BY MR. McKINNEY:

* * * *

[fol. 36] Q Mr. Bradley, as reflected by the photographs, state whether or not the door now as it existed on April 15, 1964, the door that leads from the lobby into the north and south corridor of the jail, state whether or not that door opens toward the lobby?

A It does, sir.

Q Now stepping through that door and then going to the right down the east-west corridor toward the prisoner area which way does that door open?

A That opens toward the west into the corridor.

Q Toward the west and I believe towards the north wall doesn't it to your right?

A That is correct.

Q What was your age on April 15, 1964?

A 57.

Q What is your date of birth?

A November 2, 1907.

Q What was your height on that date?

A 5-8.

Q Five feet eight inches?

A Right.

Q I will ask you whether or not on that date you suffered from any defect of health?

A No I don't think so sir.

Q Mr. Bradley, on Wednesday April 15, 1964, shortly before the hour of 5 P. M. state whether or not you had [fol. 37] occasion to go to the prisoner area where James Cleveland Burgett, the defendant in this case was a prisoner?

A I did, sir.

Q What caused you to go to that prisoner area?

A He had called back there that he wanted to use the telephone.

Q Pursuant to that request, what did you do?
A I went back there to the cell and let him out to use the telephone.
Q Did you use the control box?
A I did, sir.
Q What did you do then after you opened the door?
A I brought Mr. Burgett out to the office area to use the telephone.
Q I will ask you whether or not he used the telephone?
A Yes sir he did.
Q And state what happened then.
A He made a call which I thought at that time was a local call, which I ascertained later was a long distance call and called somebody in Tenn.
Q State what happened next.
A Well he talked for a while there and he asked whoever he was talking to—
Q Don't go into his conversation right there, Mr. Bradley.
A He did call long distance.
[fol. 38] Q Did he complete his call?
A Yes sir.
Q What happened then?
A At that time after he completed the call, I went to put him back into his cell.
Q Describenow following the completion of the call, describe his movements and your movements in going back to the cell.
A Well he accompanied me back into the hallway into the cell area and then I asked him to stand to one side while I opened the door.
Q I will ask you whether or not any jail personnel or trusties in the jail accompanied you also?
A No sir, not at that time.
Q Continue.
A I did have a trusty down there who had taken another prisoner to be put upstairs.
Q You asked him to stand to one side?
A That is correct.
Q Did the defendant stand to one side?
A He did.

Q With reference to where you were standing at the control box, where was he standing?

A He was standing to my right.

Q All right, sir, what happened then?

[fol. 39] A I opened the door to the control box, tripped the level to open the door and when I did so he stepped behind me.

Q And what happened next?

A Well I saw his left hand coming around to my left and he had a knife in his hand and I immediately grabbed his left hand with my right hand in this manner, and I took my left hand and hit him in the stomach, knocking him up against the wall where I could get turned around.

Q Did you get turned around?

A Yes I did.

Q What happened then?

A Well there was a scuffle occurred there.

Q Would you please state what occurred during that scuffle.

A Well he was cutting at my throat three or four times with the knife of which I think he changed hands with.

Q Did you observe the knife?

A I have the knife in my possession now.

Q At that time did you observe it?

A Yes I did.

Q I believe you stated that he cut at your throat three or four times.

A That's correct.

Q State how he would swing at your throat.

A He was swinging like this.

[fol. 40] Q Would you describe the arc of those swings made by the defendant to the jury.

A Well he was standing in front of me then and he was just swinging in an arc like that.

Q I will ask you whether or not the blade of the knife you have described struck you?

A Yes, it did.

Q Where?

A Behind the left ear.

Q Describe the wound that it made.

A It made a wound about an inch to an inch and quarter long and about an eighth inch deep.

Q I will ask you how the knife avoided hitting you or striking you in the throat?

A That I couldn't say except that I was moving pretty fast and in that scuffle I lost my keys.

Q Would you estimate how close the blade of that knife in motion came to your juglar vein.

A I couldn't say how close but it could have been very close.

Q I will ask you whether or not the thrusts were right under your chin?

A From the left ear to under my chin, yes sir.

Q I will ask you whether or not you would jerk your head back when those thrusts came at you?

A I was moving very fast.

[fol. 41] Q I will ask you how that knife kept from hitting you in the throat, Mr. Bradley?

A That I couldn't say.

Q Can you attribute it to any fact other than the fact that you were jerking your head back from the thrusts?

A I was jerking my head backand I was moving from side to side and pushing and shoving.

Q What happened then?

A I lost my keys, I retreated down the hallway and pulled the grating door in the east-west corridor closed.

Q Is that the door that's pictured in State's Exhibit No. 2?

A That is correct.

Q You pulled it closed.

A Yes sir.

Q What happened then?

A Well he cut at my hands three or four times and tried to pull the door open.

Q State what if anything that you would do when he cut at your hands?

A I would turn it loose. I would pull the door, he would cut at my hands, I would turn the door loose and pull it open. I would grab it again and pull it shut.

Q How many times did he do this?
A At least three times.
[fol. 42] Q And what happened then?
A Well all the time I was hollering "jail break" "jail break" "jail break" trying to get some help from the trusties who were upstairs down there to help me.
Q And what happened next?
A Well about the time the trusties came down why I shoved the door open in Mr. Burgett's face and kicked him.
Q And what happened then?
A Well he retreated down the hall then, slid the knife down the hall.
Q At the time you kicked him state whether or not he still had possession of the knife in question?
A He did.
Q And what did he do when you kicked him?
A He just turned around and walked down the hall and he slid the knife down and said "I give up".
Q And what happened then?
A One of the trusties picked the knife up and handed it to me.
Q I will ask you whether or not you saw the trusty pick the knife up?
A What trusty picked it up I couldn't say. It was a trusty picked it up.
Q I will ask you whether or not you saw him pick it up?
A It was a trusty picked the knife up, yes sir.

* * * *

[fol. 43]

* * * *

THE FOLLOWING TESTIMONY WAS GIVEN OUTSIDE THE PRESENCE AND HEARING OF THE JURY:

MR. CAMERON McKINNEY, A WITNESS FOR THE STATE, after first being sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

EXAMINATION BY MR. BANNER:

* * * *

[fol. 44]

* * * *

Q I will ask you whether or not during the course of this interview that the defendant, James Cleveland (Jimmy) Burgett, the defendant in this case, whether during the course of that interview he signed the statement to which you have been referring?

[fol. 45] A After the same was typed he did sign it.

(STATE'S EXHIBIT A WAS MARKED)

Q I now hand you State's Exhibit A and ask that you examine same please.

A All right, sir.

Q Please state whether or not State's Exhibit A is a written statement about which you have been testifying?

A It is. Mr. Banner, with this one qualification. This is a signed carbon. The original went into evidence in another proceeding. This is a signed carbon and he did sign it in my presence and the same was prepared at the same time the original was by me typed.

DEFENDANT: We will object to the carbon being used as evidence in this case when the original is the proper evidence.

A The signatures are not carbon. The original signatures are on there.

COURT: Where is the original?

MR. McKINNEY: I don't know. You will have to ask Jimmy Hughes.

COURT: I will reserve my ruling on that objection.

Q Would you state whether or not in words and substance that which appears on this original duplicate is the same as that which appears on the original?

A It is exactly the same.

Q And I did ask you whether or not it bore the defendant's signature?

[fol. 46] A It does.

Q Please state whether or not you saw him affix his signature to the bottom of that statement?

A To this statement and to the original.

Q Please state whether or not you were present at all times during the course of this interview with the defendant?

A I was in the same room with him from the time the interview began when Mr. Clifton brought him in until the interview was concluded after he signed the statement.

Q So you state that you were present during the time in which State's Exhibit A was reduced to writing and at the time it was signed by the Defendant.

A Yes sir at all times.

Q Prior to the time the defendant signed the statement which is marked as State's Exhibit A please state whether or not you gave him any warning?

A I did.

Q What was the warning given to the defendant?

A When he first came into the office I asked him if he desired legal counsel, and told him he was entitled to legal counsel if he wanted it. Before he signed the statement I warned him that he did not have to make any statement at all and that any statement made by him might be used in evidence against him onhis trial or trials for the offense or offenses concerning which such statement was by him made.

[fol. 47] Q And is that warning that you have just recited contained anywhere in State's Exhibit A?

A The warning as to silence is contained in the printed matter at the beginning of the statement, which was on there at the time the statement was prepared.

Q I will ask you whether or not prior to the time the defendant signed the statement which is State's Exhibit A, whether or not he was given an opportunity to read the same?

A He was.

Q And did he read the same?

A He did.

STATE: We offer it in evidence.

COURT: Do you have any other objection for the purpose of this hearing?

DEFENDANT: At this hearing. It doesn't go into the main trial at this time.

COURT: No sir.

DEFENDANT: Other than that they have had plenty of time to get the original paper.

COURT: Mr. McKinney, is this James Cleveland Burgett the original signature on this?

A I know that it is, but let me look, sir. It is, sir.

COURT: Is that your original signature as a witness?

A It is and it is the original signature of Mr. Clifton. Your Honor we prepare those things in duplicate and [fol. 48] often in triplicate and they sign all of the copies so as to make originals of them. It is done that way.

COURT: I am going to overrule your objection.

DEFENDANT EXCEPTED.

CROSS-EXAMINATION

BY MR. HUNTER:

Q Mr. McKinney, was Mr. Burgett under arrest at that time?

A He was.

Q He was in jail?

A He was in custody, yes sir.

Q And where did they find Mr. Burgett when they brought him down to you?

A Where did they what?

Q Where was he in the jail. There are various places of holding a man—what part of the jail did they find him in?

A I can't tell you.

Q You don't know whether he was in solitary confinement with restricted rations or not?

A I can't tell you, Mr. Hunter, to give a completely honest answer. First of all I didn't see him in solitary confinement. Secondly, I do not recollect whether I was even told. Thirdly, it is entirely possible that he might have been, due to the things that had transpired immediately before taking it. I can't tell you.

Q There was nothing preceding this signing other than [fol. 49] the warning of this man that this would be

used against him, there was nospecial persuasion to get this confession from Mr. Burgett?

A No sir.

Q None at all?

A No sir.

Q He just willingly signed it?

A Yes sir.

MR. HUNTER: I have no further questions.

COURT: Mr. Burgett, I want you to listen to this, you and your counsel too. In matters of this kind, you have a right to testify if you desire at this time at this hearing in the absence of the jury. The testimony that you give at the hearing on this motion before the court will not be read or used in any way against you on your jury trial. I am not talking about the statements in the confession because that's a matter to be decided later. If you elect to come to the stand and testify concerning the circumstances of the taking of your confession, or the matters immediately surrounding it or immediately before that, you are authorized under the law to do that and under the law it is my duty to see that that's not used against you before the jury and also that you will not be questioned about the offense for which you are on trial or cross-examined about it during this hearing. All you will be questioned about will be [fol. 50] matters in connection with your confession or incident from the time after the alleged offense up to the time you signed the alleged purported confession. With that information, I would like for you to confer with your counsel as to whether you would like to testify or not relative to the taking of the confession.

(DEFENDANT CONFERRED WITH HIS ATTORNEY)

JAMES CLEVELAND BURGETT, THE DEFENDANT, after first being sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(STILL OUTSIDE THE PRESENCE AND HEARING OF THE JURY)

Q For the record, will you state your name?

A James Cleveland Burgett.

Q You are charged with an offense on April 15, 1964 of assault with intent to murder. The state is introducing here a paper purporting to be a voluntary statement of yours. Will you read that statement or look at it please.

A (Witness reads)

DEFENDANT: Your Honor, we would like to lay some grounds for our contention that this is not voluntary and we will have to go a little bit before the incident itself to properly apprise the court of the situation.

COURT: I will permit you to do that unless you go into fields I don't expect you to. You will not open up to the state any matter other than something you question him about.

[fol. 51] Q How long had you been in jail in this place before this incident, this was on April 15th?

A Since January 6, 1964.

Q Had you at any time asked for counsel to be appointed to your help?

A To tell the truth I don't know. I can't remember that far back.

Q Now this incident happened on the evening of the 15th of April and you have heard the testimony that you went back to your cell. After you went back to your cell, what happened then, who was the next people you saw after you went back to your cell?

A You mean after I had used the phone?

Q Afterwards, after this incident was completed.

A After this occurred?

Q Yes.

A The sheriff.

Q That was Mr. Frank Lane.

A Frank Lane.

Q And who was with Mr. Lane?

A Well the sheriff was present and the colored trusty by the name of Goldy—that's all I remember right there, the sheriff and this colored trusty, Goldy.

Q What happened then?

A Well they come back there and called me out and [fol. 52] put me in a solitary confinement cell, what they call the sweat box.

Q They call it the sweat box?
A Well it is. You sweat in there.
Q And did they explain to you that you were required to make a statement in this?
A They didn't explain nothin' to me that night. Put me in the sweat box.
Q Kept you there until next morning?
A The next morning they took me out.
Q Did they feed you during that time?
A No.
Q Where did they take you to then?
A Down to Mr. McKinney's office.
Q How long were you in Mr. McKinney's office?
A I don't rightly know.
Q How long were you in there before they started faking this statement?
A I believe we was in there a little while and went to see this J.P., Justice of the Peace and he set a bond or something and they started back up on the elevator and asked me if I would give a statement at the time. I said "Yes I will give a statement" you know as much as I know about it" and took me back down there on the elevator, before I even got back up to the jail we went back to his office.
Q The question this court is trying to determine, did you voluntarily make that statement?
[fol. 53] A Well after reading this over and of course the signature looks something like mine but seems like there is a few items added in here that I did not quote to Mr. McKinney as he typed it down.
Q If that is your statement, did you read it before you signed it?
A I read a statement that I gave to Mr. McKinney.
Q The statement that you gave Mr. McKinney at that time, was it voluntary?
A Well I figured I had better give one because I was in the sweat box and afraid they might leave me there and I wanted out of there.
Q You were afraid, you were frightened.
A Yes.
Q Did you ask for counsel?

A I think I was shook up I didn't know what I was doing, I don't know whether I did or not.

Q Did you knowingly waive counsel?

A No not that I know of.

Q Did they threaten you in any way if you didn't sign this?

A You mean bodily harm or what?

Q Well bodily harm or anything. What inducement did they use, if any?

A Well I don't know that they just come out and threatened me like that but I was afraid that they would [fol. 54] just keep leaving me in that sweat box and I wanted out of there which they had done said I was going to have to do at least six days they knowed of, they never specified no definite amount of time. I did five of those days in that sweat box. They let me out the third day and that's pretty hard on you.

CROSS-EXAMINATION

BY MR. McKINNEY:

Q Jimmy, I believe you stated that you went in front of Judge Wacasey immediately prior to giving the statement?

A Prior means before?

Q Yes.

A I remember going in his office.

Q That was for the purpose of your being charged with the offense of assault with intent to murder on Mr. Bradley wasn't it?

A I remember you saying it was a charge for attempting to commit murder, I remember that.

Q Do you remember Judge Wacasey asking you if you wanted an examining trial?

A That I do not.

Q You don't remember his asking you that?

A No sir.

Q Do you remember Judge Wacasey asking you if you wanted a bond set?

A I remember that and I remember that I said,

[fol. 55] which I was ignorant about it I didn't know what I was doing or nothin' "I don't know whether I do or not" and he said "the state requires it" and you set the bond at $2500.00.

Q That was a recommendation made on my part to the court wasn't it?

A I guess it was.

Q Was Mr. Clifton with us down there?

A Not in there with the judge I don't believe.

Q What officer was?

A I think it was just you and I walked in there before Mr. Wacasey.

Q Do you mean to tell me that I brought you out of the jail down to a magistrate's office, just me and you?

A No, Mr. Clifton come and got me out of the sweat box.

Q Where did he take you to?

A Down to your office.

Q And then did we leave there and go before a magistrate where you were charged?

A We went before a J. P. I don't know what about that other.

Q All right, Justice of the Peace, and that's Justice of the Peace, Homer Wacasey wasn't it?

A It was Mr. Wacasey.

Q Are you meaning to testify that Mr. Clifton, a deputy sheriff or some other officer did not accompany us down there?

[fol. 56] A To the best of my memory I don't remember him being in there where we was at.

Q Where was it?

A Somewhere in this courthouse.

Q Is it your testimony before this court now that at some time you were in front of Judge Wacasey with me and there was no officer present?

A I am sure he wasn't and you and I walked in there —that's when he asked me about a bond which I don't know about a bond—I figured I had done had time and all that, I couldn't see any sense myself in a bond and he said "well the state requires it" real fast and you said

you recommended it I guess that a bond be set and this bond was set as you recommended, it was $2500.00.

Q But you don't believe there was an officer in there?

A I don't.

Q Now we left from there I believe you said,—well we were on the elevator going up to the fifth floor.

A That is correct.

Q Was Mr. Clifton in the elevator?

A That's right.

Q Was I on the elevator?

A You was on it.

Q Was it there I asked you if you wanted to make a statement about what happened?

[fol. 57] A That's correct.

Q And then we went to my office.

A Yeah we rode the elevator and went to your office.

Q Now from the time you signed that statement, from the time that Mr. Clifton came and got you out of the sweat box as you have testified until the time you signed that statement, did anybody threaten you?

A Not that I know of. I was in the sweat box so I couldn't talk to nobody. Mr. Clifton came and got me and I didn't know what he wanted with me.

Q Did anybody make any promise of any sort?

A They didn't promise to get me out of the sweat box or anything like that.

Q Did they make you any other sort of promises, Mr. Clifton or myself or any other person?

A I can't say—I don't believe you did, I will say that.

Q Jimmy as a matter of fact didn't you tell me when I asked you if you wanted to make a statement about it, said "Well I might as well go ahead and make one."

A I don't remember saying those words, no.

Q How long were you in my office?

A I don't know.

Q Did I almost immediately start typing after you went into my office?

A After we went back down on the elevator?

[fol. 58] Q Yes.

A You started typing I am pretty sure.

Q And while I would be typing wouldn't I ask you questions?

A Yes you asked me questions. Well you told me I will give you the statement about what I done and like that you know.

Q Well as a general rule you just didn't sit there and narrate that entire statement. Wasn't it in response to questions I asked you?

A I don't know—I couldn't say about it.

Q Wouldn't I ask you things like "what happened next?" and "What was done then?" and "What was said then" and questions of that sort?

A I guess you did.

Q Now Jimmy do you think this statement right here is unlike the original?

A I do.

Q You think it is unlike it.

A I sure do.

Q Now the original has been read into the record at another term of court hasn't it, at another trial, the one you signed?

A Concerning this I couldn't say.

Q Jimmy let me say this, we can call out of town and find the court reporter and see where the original is.

[fol. 59] (Consultation of the attorneys with the judge out of the hearing of the jury which was still out of the court room)

Q Were you surprised Jimmy at having gone to the sweat box?

A Surprised at going to the sweat box?

Q Um-huh on the date you testified to were you surprised at having gone to the sweat box?

A I figured they would put me there somewhere.

COURT: Gentlemen, let's proceed. I think we are wasting time. I am going to hold the admission inadmissible. In view of the State's admissions before the Court that the defendant prior to the taking of the confession was held in a sweat box, was not given any foot, was not allowed to communicate with anybody but was in solitary confinement for that period until he was brought down to Mr. McKinney's office, the court rules that the confession will not be admitted before the jury.

AT THIS TIME THE JURY WAS BROUGHT BACK INTO THE COURT ROOM.

OFFERS IN EVIDENCE

STATE: The State of Texas offers into evidence its Exhibit 5, a certified copy of the judgment and commitment in Cause No. 6,711 styled The State of Tennessee vs. James Burgett, having been rendered on June 17, 1961 in the Circuit Court of Maury County, Tenn. under certificate of the Clerk of that court.

DEFENDANT: Defendant objects to that being introduced as evidence. If you will note on that judgment there, on the face of the judgment it says that this defendant was before that court without counsel. It does [fol. 60] not indicate that he waived any counsel. Under our Texas laws that would not be a felony.

(CONSULTATION AT THE JUDGE'S DESK WITH THE ATTORNEYS)

DEFENDANT: I further object. This violates the Defendant's constitutional rights under the 14th and 15th amendments.

COURT reserved his ruling until State gets all of these offered into evidence.

(State's Exhibit 6 was marked).

STATE: If it please the Court, the State would next offer into evidence a copy of the indictment in Cause No. 6711 styled State of Tenn. vs. James Burgett in the Circuit Court of Maury County, Tenn. a certified copy of the Judgment and Commitment in that cause, the finger prints, a set of finger print impressions of one James Cleveland Burgett and a photograph of a James Cleveland Burgett in one package all under the certificate of the Warden of the Tenn. State Penitentiary and the Secretary of State of the State of Tenn. as State's Exhibit No. 6.

DEFENDANT: We would make the same objection, Your Honor, to this that we made to the other instrument just presented to the court.

COURT: I will reserve ruling on this too.

(State's Exhibit 7 was marked).

MR. McKINNEY: At this time the State would offer into evidence the State's Exhibit No. 7, a certified copy of the indictment in Cause No. E-4825K styled The State of Texas vs. Jimmy Cleveland Burgett in the Criminal District Court No. 4, Dallas County, Texas.

[fol. 61] DEFENDANT: We have no objection.

COURT: State's Exhibit No. 7 will be received at this time.

* * * *

[fol. 62] MR. RICHARD CROWELL, CALLED BY THE STATE AS A WITNESS, after first being sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Q State your name.

A Richard Crowell.

Q Do you hold any official position in Hunt County, Texas?

A Yes I do.

Q And what is that position?

A District Clerk.

Q And how long have you served in that capacity?

A Since January 1, 1963.

Q You are of course literate and conversant with the English language, reading the same?

A Yes I am.

Q I hand you an item which has been marked State's Exhibit No. 8 and which purports to be a judgment and sentence in the Criminal District Court No. 4 of Dallas County, Texas. Would you please read that to the jury.

A "Certified copy of Judgment and Sentence, Jury waived.

[fol. 63]

* * * *

[fol. 64] Q Mr. Crowell does State's Exhibit No. 8 contain an endorsement?

A No it does not.

Q I hand you now State's Exhibit No. 7. Would you please read that to the jury.

A (Read to the jury) (See Exhibit No. 7 preceding pages)

Q Does that instrument bear an endorsement?
A Yes it does.
Q What is the part endorsed thereon?
A
Q What is the style endorsed thereon?
A The State of Texas vs Jimmy Cleveland Burgett, a true bill for burglary. Signed Cecil M. Higginbotham, Foreman of the Grand Jury.
Q I will ask you whether State's Exhibit No. 7 bears a certificate?
A It does.
Q And would you read that certificate please sir.
A "The State of Texas, County of Dallas.
I Bill Shaw, Clerk of the Criminal District Court No. 4 of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the original true bill in the case of The State of Texas vs. Jimmy Cleveland Burgett, now on file in my office.
Witness my official seal and signature at office in the City of Dallas, this 27th day of April, 1965.
Bill Shaw, Clerk of Criminal District Court No. 4 Dal-
[fol. 65] las County, Texas.
Signed by Margaret Wood, Deputy."

(AFTER CONSULTATION OF ATTORNEYS WITH THE JUDGE AT THE JUDGE'S BENCH, THE JURY WAS EXCUSED FROM THE COURT ROOM AND THE FOLLOWING TESTIMONY WAS GIVEN OUT OF THE PRESENCE AND HEARING OF THE JURY.

MR. RICHARD CROWELL, HAVING PREVIOUSLY BEEN SWORN, TESTIFIED AS FOLLOWS:

BY MR. McKINNEY:

Q You are the same Richard Crowell that just testified?
A I am.
Q I will ask you whether or not you have examined the certified copy of the sentence which you just read, the same being State's—a part of State's Exhibit No. 8 in Cause No. E-4825-K styled The State of Texas vs Jimmy

Cleveland Burgett in the Criminal District Court No. 4 of Dallas County, Texas.

A Now what was your question?

Q Have you examined it?

A Yes I have.

Q You have it before you?

A Yes I do.

Q Would you look at that part of the sentence that deals with the punishment administered.

A Yes I am looking at it.

[fol. 66] Q All right, would you read it to us as you read it to the jury?

A "It is the order of the court that the said defendant who has been adjudged to be guilty of burglary as charged in the Indictment and whose punishment has been assessed by the Court at confinement in the penitentiary for three years be delivered by the sheriff of Dallas County, Texas immediately to the Superintendent of the Penitentiary of the State of Texas or other persons legally authorized to receive such convict and said defendant shall be confined in said penitentiary for not less than two nor more than three years in accordance with the provisions of the law governing penitentiaries of said state."

Q Now where you last read the words "3 years" is the word three there spelled out or is a numeral used?

A It's a numeral used.

Q Now I will ask you whether or not you see close to that 3, the numeral 3, an impression of another numeral 3?

A Yes sir I do.

Q Is it a light impression or dark impression?

A It is a light impression.

Q Is it to the left of the numeral 3 you read or to the right?

A To the left.

Q What is immediately to the left of the light impression?

[fol. 67] A The word "than".

Q Is the n right next to it or is there a space between them?

A It is right next to it.

Q The little letter n in than is right next to the light impression 3.

A Yes and I might add that the light impression is not on the same line with the other numeral No. 3 and is not in line with the word "than".

Q I will ask you whether or not you type?

A I do.

Q Is it a part of the performance of your duties as District Clerk of Hunt County, Texas?

A It is.

Q And for how long have you typed?

A About ten years approximately.

Q I will ask you whether or not in typing it is possible to make a strike of that sort through accident?

A It is.

Q If that figure had been purposely typed, that is the light figure had been purposely typed would it ordinarily have been on the same level with the 3 read to the jury?

A Ordinarily both numbers would have been three if the typewriter carriage had not been moved. It would have been on the same level.

[fol. 68] Q And for the dim 3 to be in the position as there is, you would have to move your typewriter—

A You would have to roll the carriage.

Q To get it in that position.

A Yes sir.

CROSS EXAMINATION

BY MR. HUNTER:

Q You say one of these 3's is dark and another one is heavy?

A No, one is dark and one is light.

Q Are there two threes there?

A Yes sir, there are.

Q Is there enough sequence that it would read 33?

A Well it didn't to me. The first time I read it I didn't even notice the other 3 until it was called to the attention of the Court.

Q Is this a whole typewriter space above or below or is it just a fraction off?

A No it's just off a fraction. It wouldn't be off even a half space, not even a quarter space.

Q Now this is a court sentence of a man, taking a part of his time, taking a span out of his life.

A Yes sir I understand.

Q Now if that court had wanted to and there had been an error there, they could have erased that couldn't they?

[fol. 69] A Yes sir.

Q Does it show any indication of an erasure?

A Yes sir it shows it was either corrected type or an erasure of some sort—it appears to me—I am just giving you my opinion because I don't know, but if you will notice that this is a photostatic copy and it will pick up the least little flaw and it may appear to the naked eye that that was completely erased and there is also on the right hand of this judgment a picture of a staple laying out there which I am sure is not a part of this judgment, but this picked it up anyway.

Q Well, but this is taking 33 years out of a man's life.

A Yes sir, if that's true, it would be.

DEFENDANT: Your Honor we submit that the judgment is a void judgment on its face.

COURT: Defendant's objection to State's Exhibit 5 is sustained. Defendant's motion to strike State's Exhibit 8 after it had been admitted is sustained. Defendant's objection to State's Exhibit 6 is overruled.

DEFENDANT" EXCEPTED.

AT THIS TIME THE JURY WAS BROUGHT BACK INTO THE COURT ROOM AND THE FOLLOWING TESTIMONY WAS GIVEN:

* * * *

[fol. 70]

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 71]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT No. 5 (Not admitted in evidence)

Ordered that he be remanded to Jail subject to the orders of the Warden of the State Penitentiary.

State of Tennessee

vs

James Burgett

No. 6711

Came the Assistant Attorney-General for the State and the Defendant in proper person and without Counsel. The Defendant being charged and arraigned hereon pleads guilty to a charge of Forgery. Thereupon a Jury of good and lawful men, Citizens of Maury County, Tennessee was duly elected and impaneled, to-wit: Charlie Hood, B. S. Jackson, Elbert Elmm, Joe Scannella, W. R. Greenfield, Clarence Dodd, English Gibson, Richard Lindsey, Mack Hardison, F. A. Connelly, H. B. Littejohn and C. B. Dodson who were charged and sworn in all things to well and truly try the issues joined between the State of Tennessee as the Plaintiff and James Burgett as the Defendant; upon a plea of guilty to a charge of Forgery and a true verdict render according to the law and the evidence.

Without leaving the Jury Box and upon the recommendation of the Assistant Attorney-General, the Jurors aforesaid upon their oaths aforesaid, did say, "We, the Jury, find the Defendant guilty as charged and recommend that his punishment be fixed at nor more than three years in the State Penitentiary."

Whereupon it is ordered by the Court that the Defend-
[fol. 72] ant be confined at hard labor in the State Penitentiary for a period of not less than three nor more than three years and that he pay all the costs of this cause

for which execution may issue. It is further ordered that the sentence in this case run concurrently with the sentence in Case No. 6709.

Ordered that he be remanded to Jail subject to the orders of the Warden of the State Penitentiary.

ss: JOE M. INGRAM, Judge

STATE OF TENNESSEE, MAURY COUNTY

I, the undersigned Clerk, do hereby certify that this is a true and correct copy of the original of this instrument filed this 20 day of Nov. 1964.

/s/ E. B. RICHARDSON,
Circuit Court Clerk CP"

[fol. 73]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT 6

STATE OF TENNESSEE)
) SS.
COUNTY OF DAVIDSON)

I, Henry M. Heer, hereby certify:

That I am the Warden of the Tennessee State Penitentiary a penal institution of the State of Tennessee, situate in the County and State aforesaid; that in my legal custody as such officer are the original files and records of persons heretofore committed to said penal institution; that the

(1) Photograph, (2) Fingerprint record and (3) Commitment attached hereto are copies of the original records of James Burgett #55089 a person heretofore committed to said penal institution and who served a term of im-

prisonment therein; that I have compared the foregoing and attached copies with their respective originals now on file in my office and each thereof contains, and is, a full, true and correct transcript and copy from its said original.

IN WITNESS WHEREOF, I have hereunto set my hand this 25th day of March, A. D. 1965.

/s/ HENRY M. HEER,
Warden.

STATE OF TENNESSEE)
) SS.
COUNTY OF DAVIDSON)

I, Joe C. Carr, Secretary of State of the State of Tennessee do hereby certify that Henry M. Heer, whose name is subscribed to the above Certificate, was at the date [fol. 74] thereof, and is now, the Warden of the Tennessee State Penitentiary, and is the Legal Keeper and the officer having the legal custody of the original records of said Tennessee State Penitentiary; that the said Certificate is in due form; and that the signature subscribed thereto is his genuine signature.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of the State of Tennessee this 25 day of March, A. D. 1965.

/s/ JOE C. CARR
Secretary of State of the State of Tennessee.

(SEAL ATTACHED)

* * * *

STATE OF TENNESSEE, MAURY COUNTY

Be it remembered, that at a regular term of the Circuit Court for Maury County, State of Tennessee, began and held at the courthouse in the city of Columbia, the same being the 4th Monday in May, 1961, present and presid-

ing the Hon. Joe M. Ingram, Judge, etc., following which, after said term had continued until the following date is shown, the following proceedings were had and entered of record, to-wit:

Minutes of 17 day of June, 1961, of said term.

STATE OF TENNESSEE	)	No. 6711 Indictment for
VS	)	Forgery
JAMES BURGETT	)	Guilty of Forgery.

Came the Attorney General on the part of the State, [fol. 75] and the defendant in proper person, who being arraigned at the bar of the Court, and charged on the bill of indictment, pleads guilty to the same (and for his trial puts himself upon the country, and the Attorney General doth the like), when to try the issue thus joined between the State of Tennessee and the defendant James Burgett came a jury of good and lawful men, who had been duly elected, tried and sworn to well and truly try said issue of facts joined between the State of Tennessee and said defendant James Burgett, and fix the punishment of said defendant; said jury being composed of the following, to-wit:

Charlie Hood	English Gibson
B. S. Jackson	Richard Lindsey
Elbert Elmm	Mack Hardison
Joe Seannella	F. A. Connelly
W. R. Greenfield	H. B. Littlejohn
Clarence Dodd	C. B. Dodson

After said jury had heard the evidence, argument of counsel and the charge of the Court, they retired to consider of their verdict, and they then returned into open court, and they said, according to their oath to make a true deliverance, and fix the punishment, according to their charge, that they find the defendant guilty of Forgery, and fix his punishment at 3 years in the Penitentiary House of this State. Whereupon the Court proceeded to pass sentence upon the defendant, according to the finding of said jury, that is the defendant shall serve an indeterminate sentence of not less than 3 years, nor more

[fol. 76] than 3 years in said Penitentiary House to run concurrently with #6709, that said defendant be rendered infamous, and incapable of giving evidence in any of the Courts of this State, or of exercising the privilege of the elective franchise; that he pay the cost of this prosecution, for which execution will issue.

STATE OF TENNESSEE

COUNTY OF MAURY

I, Evan B. Richardson, Clerk of the Circuit Court for said County and State, do hereby certify that the above is a true and perfect copy of the verdict, judgment and sentence in the case of the State of Tennessee vs James Burgett, as the same appears of record in my office.

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, at office, in the city of Columbia, on this the 17 day of June, 1961.

/s/ EVAN B. RICHARDSON,
Clerk C. P. D.O.

STATE OF TENNESSEE, MAURY COUNTY

CIRCUIT COURT

MAY TERM, A. D. 1961

The Grand Jurors for the State of Tennessee, good and lawful men, duly elected, impaneled, sworn and charged to inquire for the body of the County of Maury, and State aforesaid, upon their oaths aforesaid, present: That James Burgett in said County and State, heretofore, to-wit, on the 1st day of May, 1961 unlawfully, feloniously [fol. 77] and fraudently did forge, alter or make, a certain instrument in writing, purporting to be a check which is as follows:

Columbia, Tenn. 5-1, 1961

THE MIDDLE TENNESSEE BANK

PAY TO THE ORDER OF Cathey's Grocery $14.00
$14.00/100 .....Dollars
For Groc. & Cash

DON DAVIS

And he the said James Burgett, did then and there, unlawfully, feloniously and fraudulently, by means of said forged instrument, intended to injure and defraud James Cathey, as manager of Cathey's Grocery out of his property, and same was so fraudulently and feloniously done by said James Burgett to the prejudice of the rights of James Cathey, as manager of Cathey's Grocery, against the peace and dignity of the State of Tennessee.

SECOND COUNT:

And the Grand Jurors aforesaid, upon their oaths aforesaid, further present that on the day and date aforesaid, in the State and County aforesaid, the said James Burgett did unlawfully, feloniously and fraudulently offer to pass or transfer, or did pass or transfer, to James Cathey, as manager of Cathey's Grocery, a certain instrument in writing as follows:

Columbia, Tenn. 5-1, 1961

THE MIDDLE TENNESSEE BANK

PAY TO THE ORDER OF Cathey's Grocery $14.00
$14.00/100 .....Dollars
For Groc. & Cash

DON DAVIS

[fol. 78] when he the said James Burgett knew, then and there, that same was a forgery and same was done by him with the felonious intent to defraud the said

STATE OF TENNESSEE, MAURY COUNTY

OFFICE OF THE CLERK OF THE CIRCUIT COURT FOR MAURY COUNTY.

I, Evan B. Richardson, Clerk of said County, do hereby certify that the foregoing is a true, perfect copy of the indictment in Case No. 6711 in re: State of Tenn. vs. James Burgett as appears of record now on file in my office.

Witness my hand and affix Seal of the Court, at office in Columbia, Tennessee, this 19 day of June, 1961.

/s/ EVAN B. RICHARDSON.

[fol. 79]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT 7

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF TEXAS, the Grand Jurors, good and lawful men of the County of Dallas, and State of Texas, duly elected, tried, empaneled, sworn and charged to inquire of offenses committed within the body of said County of Dallas, upon their oaths do present in and to the Criminal District Court No. 4 of Dallas County, at the January Term, A. D. 1964, of said court, that one Jimmy Cleveland Burgett on or about the 13 day of December in the Year of our Lord One Thousand Nine Hundred and 63, in the County and State aforesaid, did by force, threats and fraud, break and enter a house there situate and occupied and controlled by J. R. Chism without the consent of the said J. R. Chism and with the intent then and there on the part of the said Jimmy Cleveland Burgett fraudulently to take from said house corporeal personal property therein being, and belonging to the said J. R. Chism from the possession of the said J. R. Chism without the consent of him, the said J. R. Chism and with the intent to deprive the said J. R. Chism the owner of said corporeal personal property of the value thereof, and with intent to appropriate the same to the use and benefit of him, the said Jimmy Cleveland Burgett.

Against the peace and dignity of the State

/s/ CECIL M. HIGGINBOTHAM,
Foreman of the Grand Jury

HENRY WADE
Criminal District Attorney of
Dallas County, Texas

[fol. 80] WITNESSES: J. R. Chism, Leon Thornberry, C. A. Jones, H. W. Behringer, I. F. Van Cleave.

COMPANION CASES:

George W. Warren, Charles F. Warren

No. E 4825 K

THE STATE OF TEXAS

vs.

JIMMY CLEVELAND BURGETT

A TRUE BILL—BURGLARY

Cecil M. Higginbotham, Foreman of the Grand Jury Filed Feb. 17, 3:23 P. M. '64, Bill Shaw, Dist. Clerk Dallas Co., Texas, s/s Matthews Deputy.

THE STATE OF TEXAS)
COUNTY OF DALLAS)

I, Bill Shaw, Clerk of the Criminal District Court No. 4 of Dallas County, Texas do hereby certify that the above and foregoing is a true and correct copy of the original TRUE BILL, in the case of the State of Texas vs Jimmy Cleveland Burgett now on file in my office.

Witness my official seal and signature, at office in the City of Dallas, this 27 day of April A. D. 1965

BILL SHAW, Clerk Criminal District Court, No. 4 Dallas County, Texas. By Margaret Wood Deputy."

[fol. 81]

STATE'S EXHIBIT A (Not Admitted)

VOLUNTARY STATEMENT OF JAMES CLEVELAND BURGETT

Thursday Morning, April 16, A. D. 1964

I, James Cleveland Burgett, after having been first duly warned by Cameron McKinney, the person to whom the hereinafter set out statement is by me made, as follows: First, that I do not have to make any statement at all; Second, that any statement made by me may be used in evidence against me on my trial or trials for the offense or offenses concerning which this statement is made; do, hereby make the following voluntary statement in writing:

My full name is James Cleveland Burgett, and I am a white male, and am 24 years of age having been born September 24, 1939, in Mt. Pleasant, Tennessee. My usual occupation is that of a construction worker. At the time of my last arrest, I was living in Dallas, Texas. I am 6'-0" tall and weigh about 165 pounds.

About a couple of weeks ago, I found this pocket knife on a bunk in the cell where I was in the Hunt County Jail. This is the same knife I cut at Mr. Bradley with yesterday afternoon while I was trying to get out of the jail. I had asked Mr. Bradley to let me use the jail telephone and he took me to the desk where the telephone was. I called my ex-wife, Wilma Fay Thornberry Burgett, in Franklin, Tennessee; this was a collect call to her. After this call, when Mr. Bradley was taking me back to my cell, this is when I pulled this knife out of my pockett. [fol. 82] I was behind him when I pulled this knife out there by the cell door. I pulled it out and opened it. Me and Mr. Bradley then had a scuffle. It was during this scuffle that I cut at him with this knife. This whole thing grew out of my intention to break out of jail here. I hollered at the rest to come on; everybody was wanting to break out. I knew I was doing a wrong thing when I

did what I did. Nobody has mistreated me at all since I have been in jail here. I just didn't want to go to the penitentiary for what I have done. I had rather be down there at Huntsville working than up here.

/s/ JAMES CLEVELAND BURGETT

Witnesses

Cameron McKinney,
District Attorney 8th Judicial District of Texas
Greenville, Texas
Fayt Clifton, Deputy Sheriff, Office of the Sheriff, Hunt County, Greenville, Texas."

[fol. 83]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

STATE'S EXHIBIT NO. 8

CERTIFIED COPY OF JUDGMENT AND SENTENCE—
JURY WAIVED

CRIMINAL DISTRICT COURT NO. 4, DALLAS COUNTY
January Term, 1964

March 12, 1964

No. E-4825-K

STATE OF TEXAS

vs.

JIMMY CLEVELAND BURGETT

THIS DAY this cause was called for trial and the State appeared by her Criminal District Attorney, and the defendant Jimmy Cleveland Burgett appeared in person, his counsel also being present and both parties announced ready for trial, and the defendant and District Attorney of Dallas County, Texas, having agreed and

requested in writing, as required by law, that the defendant be tried before the Court without a jury, and the court having agreed, the defendant in open Court in person pleaded "Guilty" to the charge contained in the indictment; thereupon the said defendant was admonished by the Court of the consequences of said plea, and the said defendant persisted in pleading guilty; and it plainly appearing to the Court that the defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear, or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of guilty is by the Court received and here now entered of record upon the minutes of the Court as the plea herein of said defendant, thereupon the indictment being presented and the defendant having pleaded guilty thereto, and the Court having heard the indictment read and the defendant's plea of guilty thereto, and having heard the evidence submitted is of the opinion from the evidence submitted that the defendant is guilty as charged.

IT IS THEREFORE CONSIDERED AND ADJUDGED BY THE COURT, That the said Defendant is guilty of the offense of Burglary, as charged in the indictment, as confessed by him in his said plea of guilty herein made, and that he be punished by confinement in the penitentiary for 3 years, and that the State of Texas do have and recover of the said defendant all costs in this prosecution expended, for which execution will issue; and that said defendant be remanded to the Sheriff of Dallas County, Texas, to await the further order of the Court herein.

SENTENCE

March 12, 1964

No. E-4825-K

STATE OF TEXAS

vs.

JIMMY CLEVELAND BURGETT

Burglary, as charged in the indictment.

THIS DAY this cause being again called, the State appeared by her Criminal District Attorney, and the Defendant, Jimmy Cleveland Burgett was brought into open Court in person, in charge of the Sheriff, for the purpose of having sentence of the law pronounced in accordance with the judgment herein rendered and entered against him at a former time of this term; and thereupon the said Defendant, was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the Court proceeded, in the presence of the said Defendant, to pronounce sentence against him, as follows:

IT IS THE ORDER OF THE COURT, That the said Defendant, who has been adjudged to be guilty of Burglary, as charged in the indictment and whose punishment has been assessed by the Court at confinement in the penitentiary for 3 years, be delivered by the Sheriff of Dallas County, Texas, immediately, to the Superintendent of the Penitentiaries of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said penitentiaries, for not less than 2 nor more than 3 years, in accordance with the provisions of the law governing the Penitentiaries of said State, and the said Defendant is remanded to jail until said Sheriff can obey the direction of this sentence. Back time allowed. Sentence to begin January 6, 1964.

THE STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Bill Shaw, Clerk of the Criminal District Court of Dallas County, Texas, do hereby certify that the above and foregoing is a true and correct copy of the Judgment and Sentence of the Court rendered and enter in the case of The State of Texas vs. Jimmy Cleveland Burgett, No. E-4825-K as the same appears of record in Book ..... Pages 328 Minutes of the Court.

WITNESS my official Seal and Signature at my office in the City of Dallas, Dallas County, Texas, this ..... day of April A. D. 1965.

By: /s/ Margaret Wood, Deputy

/s/ BILL SHAW
Clerk, Criminal District Court

[fol. 85]

IN THE 8th JUDICIAL DISTRICT COURT
OF HUNT COUNTY, TEXAS

No. 9632

THE STATE OF TEXAS

vs.

JAMES CLEVELAND (JIMMY) BURGETT

STATEMENT OF FACTS ON DEFENDANT'S MOTION FOR NEW TRIAL—June 2, 1965

Motion for new trial hearing before the Honorable Frank Wear, District Judge, 62nd Judicial District Court of Texas (sitting for the Honorable Joe N. Chapman, District Judge, 8th Judicial District of Texas), without a jury, in the district courtroom of the county courthouse, City of Greenville, Hunt County, Texas, on the 2nd day of June, 1965.

APPEARANCES:

MR. CAMERON MCKINNEY, District Attorney, 8th Judicial District of Texas, Greenville, Texas, and

MR. E. PAUL BANNER, County Attorney, in and for Hunt County, Texas, Greenville, Texas,

For the State of Texas;

MR. FLOYD A. HUNTER, Greenville, Texas, by appointment,

For the Defendant;

[fol. 86] THE COURT: What says the state?
MR. McKINNEY: State announces ready.
THE COURT: What say the defendant?
MR. HUNTER: Defendant announces ready.
THE COURT: Does the defendant wish to put on testimony?
MR. HUNTER: We do not.

MR. McKINNEY: State would like to put on a witness if the defendant doesn't want to.

THE COURT: All right. Go ahead.

E. PAUL BANNER,

called as a witness for the State, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

DIRECT EXAMINATION

BY MR. McKINNEY:

Q State your name?

A E. Paul Banner.

Q Do you hold any official position with Hunt County, Texas?

A I'm the County Attorney for Hunt County, Texas.

Q All right, sir. I will ask you whether or not you were serving in that capacity on Thursday, April the 29th, 1965?

[fol. 87] A I was.

Q And were you serving in that capacity on Monday, April the 26th, 1965?

A I was.

Q Mr. Banner, I wonder, state whether or not you assisted me as district attorney for the 8th Judicial District of Texas in representing the people of the State of Texas in Cause No. 9632, styled the State of Texas vs James Cleveland (Jimmy) Burgett, in the 8th Judicial District Court of Hunt County, Texas?

A Yes s'r, I did assist you.

Q I believe that case involved the prosecution for the offense of assault with malice aforethought with intent to murder?

A That's correct.

Q You were active in the prosecution of that case?

A Yes sir.

Q I will ask you whether or not you were present in court with me during each and every phase of the prosecution of that case, including the examination of the jury panel in the same?

A I was.

Q Mr. Banner, who conducted the bulk of the voir dire examination in that cause?

A I did.

[fol. 88] Q I will ask you whether or not you use a form in conducting a voir dire examination?

A I do.

Q I will ask you whether you addressed questions to certain of the jurors in the panel for the trial of that cause?

A Did I address specific questions—Yes sir.

Q What questions did you address to certain of the jurors, members of the jury panel selected for the trial of the case?

A I beg your pardon?

Q Members of the jury panel for the week, what questions did you address to certain of them?

A The jury panel was called the Monday of that week.

Q No, I'm talking about now some several jurors in the trial of this case, the Burgett case.

A All right. As I recall the voir dire examination in the Burgett case, I directed some general questions to the whole panel; there were three members who were on the jury panel that had not attended court earlier that week, so I asked specific questions in order to get the information that's required on this jury examination form that I used.

Q All right, sir. What specific questions did you ask of these three jurors on the panel who were not present on Monday during the same week?

[fol. 89] A Questions that I would have asked would have been whether they lived, that they had lived in Hunt County, or attempted to, what their names were, and their addresses, to determine if this is the same that appeared on the jury list, on the jury panel list, whether they were married or what their marital status, their occupation, who their employer was, and whether, if they were married, what their spouses occupation was, whether they had children and their ages, grandchildren, whether or not they had had prior jury service, and, if so,

what type, and whether or not they knew the defendant or the defendant's counsel, and whether or not they had any knowledge of this particular case being tried.

Q Now, on Thursday, April the 29th, 1965, during the trial of this cause here, what general questions did you address to the entire panel?

A As I recall I briefly discussed the nature of this type case, which was the assault with intent to murder with malice, explained the burden of proof that the law places on the State of Texas, I talked about the presumption of innocence on the part of the defendant, I talked about the right of the defendant not to testify if he chose not to, and its legal effect.

Q Did you explain to the entire jury panel what the court's charge was and its purpose?

[fol. 90] A I believe I did, and I think, in fact I'm sure I also mentioned that the indictment of course would be no evidence, and I asked them whether or not generally there would be anything that would prevent them from being a fair and impartial juror.

Q I will ask you whether or not you asked the entire panel if each of them would be willing to follow the court's charge in the trial of the cause if they were selected as jurors?

A I did and each of them answered in the affirmative.

Q I will ask you whether or not you asked the entire panel whether each and every one of them had read or heard about any of the facts in the case?

A That is correct, I asked them if they had any outside knowledge and all of them said they did not.

Q I will ask you whether or not you asked the entire panel if any of them knew the defendant?

A I did.

Q Did any of them know the defendant?

A They did not.

Q Mr. Banner, were you present in court when the state and the defendant announced ready for trial?

A I was.

Q Just a moment, announced ready for trial in Cause 9632, styled the State of Texas vs James Cleveland (Jim-

[fol. 91] my) Burgett, in the 8th Judicial District Court of Hunt County, Texas, on Thursday, April 29th, 1965?

A Yes sir.

Q I will ask you whether you recognize the defendant at whom I'm pointing across the counsel table from me at this time?

A I do recognize him.

Q I will ask you at that time when the announcement of trial was made whether or not he was present in court?

A He was.

Q Mr. Banner, I will ask you whether or not this defendant was present during the entire examination of the jury pane called for the trial of this cause?

A Yes sir, he was here at all times on the date of the trial, Thursday.

Q I will ask you whether or not this defendant James Cleveland (Jimmy) Burgett was present in court when the State and when the defendant handed its jury list indicating its pre-emptory challenges to the clerk of this court?

A Yes sir.

Q I will ask you whether or not this defendant James Cleveland (Jimmy) Burgett was present on Thursday, April 29th, 1965, during every phase of the trial of this cause?

[fol. 92] A Yes sir, he was present.

Q Was he present when the jury rendered its verdict?

A He was.

Q Was he present during the entirety of the argument?

A He was.

Q Was he present during the entirety of the testimony in the case?

A He was.

Q All right, sir. I will ask you whether or not anyone at any time prevented him from asking the jury panel called for the trial of this case any questions?

A No sir, nobody prevented him from doing so; as I recall I believe the defendant had both a pencil and some paper and made notes and from time to time consulted with his attorney, if I remember right he did this.

Q I will ask you who represented this defendant James Cleveland (Jimmy) Burgett during the trial of this cause we are discussing?

A Mr. Floyd A. Hunter, attorney, of Greenville, Texas.

Q All right, sir. Was he present at all times during the examination of the jury panel?

A Yes sir, he was.

Q Was he present during every phase of the trial on that date?

A Yes sir, he was.

[fol. 93] Q I will ask you whether or not he was afforded an opportunity to question the jury panel?

A Yes sir, he was.

Q I will ask you whether or not he did address questions to the panel?

A Yes sir.

Q I will ask you whether or not he addressed specific questions to members of the jury panel?

A Yes sir, he did.

Q Mr. Banner, when were you licensed to practice law?

A In December of 1962.

Q That was by the Supreme Court of the State of Texas?

A That is correct.

Q Have you practiced law continually since that time in Greenville, Texas?

A Yes sir, I have.

Q You have engaged in the private practice of law?

A Yes sir.

Q Prior to becoming county attorney of Hunt County, Texas, did you engage in the trial of criminal cases?

A Yes sir, I did.

Q When did you become county attorney of Hunt County, Texas?

[fol. 94] A January the 1st, 1965.

Q Have you engaged in the trial of criminal cases since that time?

A Yes sir.

Q I will ask you how long you have known Mr. Floyd A. Hunter, the defendant's counsel in this cause?

A I believe that I have known Mr. Hunter a number of years; the first professional acquaintanceship with him was about two or two and a half years ago I believe as one attorney to another, but I have known Mr. Hunter longer than that.

Q I will ask you whether or not you have ever during your practice of law discussed legal matters with him?

A Yes sir, I have.

Q Have you discussed the law with him?

A Yes sir.

Q Have you seen him engage in the trial of cases in court?

A Yes sir.

Q Have you observed him in the trial of criminal cases in court?

A Yes sir.

Q Have you ever observed him in the handling and trial of civil cases in the courts of this county?

A I do not believe that I have seen him in a civil [fol. 95] case.

Q I will ask you whether or not in your opinion he is a competent practicing attorney?

A In my opinion, yes sir, he is.

Q Mr. Banner, I will ask you whether you were active in the prosecution of Cause No. 9634, styled the State of Texas vs Joe Edwards, which was tried in the 8th Judicial District Court of Hunt County, Texas, on Monday, April the 26th, 1965?

A Yes sir, I was active in that case.

Q All right, sir. I will ask you who represented the defendant in that cause?

A Mr. Floyd Hunter represented the defendant, as did J. O. Faires, an attorney of Commerce, Texas, represented Joe Edwards, the two served in Joe Edward's case.

Q I will ask you whether or not in that case the State of Texas vs Joe Edwards, tried in this court or begun in this court on Monday, April the 26th, 1965, whether or not you conducted the bulk of the voir dire examination of the jury panel called for the week of Monday, April the 26th, 1965, for the trial of cases in the 8th Judicial District Court of Hunt County, Texas?

A Yes sir, I did.

Q I will ask you whether counsel for the defendant in that cause, Joe Edwards, examined each and every mem-
[fol. 96] ber of the jury panel in that cause?

A Yes sir, in the Joe Edwards case Mr. Faires did most of the questioning in the voir dire, but each member of the panel was specifically asked questions.

Q I will ask you whether or not Mr. Floyd A. Hunter was present in court during that voir dire examination by Mr. James O. Faires?

A He was.

Q I will ask you whether or not during that voir dire examination Mr. Hunter would be at Mr. Faires' elbow taking notes?

A He was, yes sir.

Q I will ask you whether or not after the jury was selected for the trial of cause No. 9634, The State of Texas vs Joe Edwards, the balance of the jury panel was told by the Court to return to this court on Thursday, April the 29th, 1965, at 9:30 a.m.?

A That's right.

Q And I believe you have stated that on Thursday, April the 29th, 1965, the panel did return but there were three additional members that were not examined by defendant's counsel and by states' counsel on Monday, April 26th, 1965?

A That's correct.

Q And I believe you stated that Mr. Hunter did ex-
[fol. 97] amine these three jurors individually?

A Yes sir; as I recall Mr. Hunter examined the panel collectively too.

CROSS EXAMINATION

BY MR. HUNTER:

Q Mr. Banner, was Mr. James Cleveland Burgett present on Monday, April the 26th, 1965, while you and Mr. Faires conducted the voir dire of that jury panel?

A No sir.

THE COURT: Mr. Banner, on Monday, April 26, 1965, the first case called for trial was No. — was the first case called for trial No. 9634, The State of Texas vs Joe Edwards?

THE WITNESS: Yes sir.

THE COURT: Did the State announce ready in that case when it was called?

THE WITNESS: Yes sir.

THE COURT: Did the defendant announce ready in that case when it was called?

THE WITNESS: Yes sir; I believe the defendant had some preliminary motions, but subject to those motions he announced ready.

THE COURT: Was the case No. 9632, The State of Texas vs. James Cleveland (Jimmy) Burgett called on Monday, April the 26th, 1965, or was it called on April [fol. 98] the 29th, 1965?

THE WITNESS: It was called on Thursday; I believe those dates you said are correct, Edwards case was called Monday and Burgett case was called Thursday.

THE COURT: And no other cases were called on Monday other than the Edwards Case?

THE WITNESS: I do not believe there were.

THE COURT: Was James Cleveland (Jimmy) Burgett present when his case was called for trial the first time on Thursday, April the 29th?

THE WITNESS: Yes sir, he was present.

THE COURT: Was he present throughout the trial?

THE WITNESS: Yes sir.

THE COURT: Did the court or the state in any way interfere with the examination of the jury panel by Mr. Hunter or by James Cleveland (Jimmy) Burgett?

THE WITNESS: No sir, there was no interference whatsoever, the only time the State raised any objection at all or said anything was where the State objected to an improper question being posed to the panel by the attorney for the defendant; the objection was sustained by the Court, but then the examination by the defendant's counsel continued, but other than that the state raised no objection or did in no wise or did the court in no wise interfere with examinpation of the panel by the de- [fol. 99] fendant's attorney.

THE COURT: Did the Court in any way place any time limit on the examination of the jury panel by the defendant's attorney?

THE WITNESS: No sir.

THE COURT: Now, on Monday in the trial of The State of Texas vs Joe Edwards, No. 9634, did the clerk after announcements of ready in open court in the presence of that defendant, his attorneys and states attorneys place the names of the jurors on separate sheets of paper in a box and then draw them out and type them in the order in which they were drawn before submitting the list to be examined to the attorneys?

THE WITNESS: Yes sir, the panel was shifted in the manner you have said.

THE COURT: Was a new drawing made on Thursday of that week after James Cleveland (Jimmy) Burgett and his attorney had announced ready?

THE WITNESS: Yes sir, the panel was reshouffled.

THE COURT: And redrawn?

THE WITNESS: Yes sir.

THE COURT: And new lists prepared?

THE WITNESS: Yes sir.

THE COURT: Was James Cleveland (Jimmy) Burgett present during that procedure also?

[fol. 100] THE WITNESS: Yes sir, he was.

THE COURT: And his attorney?

THE WITNESS: Yes sir.

REDIRECT EXAMINATION

BY MR. McKINNEY:

Q I have one or two more questions. Mr. Banner, taking you back to Thursday, April the 29th, 1965, to the trial of Cause No. 9632, The State of Texas vs James Cleveland (Jimmy) Burgett, following your voir dire examination of the jury panel in that case, I will ask you whether I as district attorney addressed several questions to the entire jury panel?

A You did.

Q I will ask you whether or not I propounded the question in the presence of this defendant and his counsel to the jury panel selected for the trial, selected for that week and for the trial of that case, whether or not if it developed during the trial of the case that they might have read or heard something about the facts in the case,

if they could completely set it aside what they might have read or heard and give the defendant a fair and impartial trial?

A Yes sir, You asked that question.

Q Did I ask them with reference to that question if they would consider only the evidence that came to them [fol. 101] from the witness stand in the cause from the trial of the case?

A Yes sir, you asked that question.

Q I will ask you whether or not I addressed to this jury panel before the jury for the trial of the case was selected, if there was any reason why any member of that jury panel could not give this defendant a fair and impartial trial?

A Yes sir.

Q And was there any response to the question?

A The last three questions that you have just been asking me about, in each case the panel answered your questions in the affirmative, that they could give the defendant a fair trial, and the answer to the other questions also.

MR. HUNTER: I have no questions.

MR. McKINNEY: State rests.

MR. HUNTER: Defendant rests.

MR. McKINNEY: State closes.

MR. HUNTER: Defendant closes.

THE COURT: I will overrule the motion.

MR. HUNTER: Note our exception.

* * * *

[fol. 102] AGREEMENT

It is hereby agreed by and between counsel for the the State and counsel for the Defendant that the above and foregoing Statement of Facts is true and correct.

/s/ Cameron McKinney
Counsel for the State of Texas

/s/ Floyd A. Hunter
Counsel for the Defendant

* * * *

[Reporter's Certificate Omitted in printing]

[fol. 104]

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

—Appeal from Hunt County

No. 38,860

JAMES CLEVELAND (JIMMY) BURGETT, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

OPINION—December 15, 1965

The offense is assault with intent to murder; the punishment, ten years.

The state's evidence shows that the prosecuting witness, Weldon E. Bradley, was a deputy sheriff in charge of the jail in Hunt County. Appellant was a prisoner and inmate in the jail.

Bradley testified that on the day in question appellant called him around 5 p.m. and said that he wanted to use the telephone. Thereupon, the witness went to appellant's cell and brought him out to the office area, where he used the telephone. After the call was completed, Bradley started back to the cell with appellant. When he stopped at a control box, appellant attacked him with a kn[redacted] and a scuffle ensued between them. In describing the assault committed upon him by appellant, Officer Bradley testified as follows:

> "Well he was cutting at my throat three or four times with the knife * * *
>
> "He was swinging like this.
>
> "* * * he was standing in front of me then and he was just swinging in an arc like that."

He further stated that the knife was traveling at a fast rate of speed when being swung at his throat and that he was in fear of his life, and also that appellant's thrusts with the knife were from the witness's left ear to under his chin and that he received a wound behind

the left ear about 1¼ inches long and ⅛ inch deep. The officer further testified that before appellant was subdued he "slid the knife down and said, 'I give up.'" The knife was then recovered by a trusty and was introduced in evidence at the trial as state's exhibit #4. The knife, as described in the testimony, was shown to have a blade [fol. 105] approximately 1¾ inches in length and sharp enough to cut a person.

Dr. James E. Nicholson, upon being called as a witness by the state, testified that there were certain vital organs in the neck of a human being, including the jugular vein, and, based upon a hypothetical question describing the assault made by appellant upon the officer, expressed the opinion that it was made with a means calculated to produce death. The doctor further testified that had such an arc with the knife as described been slightly deeper it could have produced death by severing the jugular vein.

Appellant did not testify but called his cell mate as a witness who gave no testimony which shed any light on the manner of the assault.

Appellant predicates his appeal upon eight points of error.

Points of error Nos. one through seven present appellant's contentions that the court erred in overruling his motion to quash certain paragraphs in the indictment alleging prior convictions for the purpose of enhancement, and in permitting the state to read such allegations to the jury. Complaint is also made to the admission in evidence, over appellant's objection, to certain records offered by the state in proof of some of the prior alleged convictions.

The record reflects that no action was taken by the court on appellant's motion to quash the enhancement allegations in the indictment. The record further shows that while the court permitted the state to offer proof as to some of them, the truth or falsity of the enhancement allegations was not submitted to the jury. The court submitted to the jury only the issue of appellant's guilt of the primary offense, and in the charge withdrew from the jury's consideration the evidence offered to prove the prior offenses and conviction and instructed the jury as follows:

"You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you in attempting to charge such prior offenses."

[fol. 106] There is no showing of bad faith on the part of the state in alleging or attempting to prove the prior convictions.

In view of such instructions by the court and no enhancement having been made as a result of the jury's verdict, no error is presented. Butler v. State, 271 S.W. 2d 658; Thomas v. State, 353 S.W. 2d 463.

Point of error No. 8 presents appellant's contention that the court erred in overruling his motion for new trial on the ground that he was not present during the voir dire examination of the jury panel on Monday before his case was called for trial on Thursday.

This is a matter which must be presented by a formal bill of exception, and in the absence thereof such contention is not properly before us for review. Beard v. State, 305 S.W. 2d 291; Welch v. State, 373 S.W. 2d 497. We observe, however, that the record shows that the jury panel reported on Monday, at which time a jury was selected to try another criminal case set for trial on that date. After the jury was selected, the balance of the panel was instructed to return for jury service on Thursday. On Thursday, the panel did return, together with three additional members who had not been examined on Monday. Thereupon, the jury panel was examined in the presence of appellant and the jury selected which served in the case. The record affirmatively reflects that appellant was present during all stages of the trial. If the contention was properly before us for review, no error would be presented.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered December 15, 1965)
Opinion approved by the court.

[fol. 107]

SUPREME COURT OF THE UNITED STATES

No. 56, Misc., October Term, 1966

JAMES CLEVELAND BURGETT, PETITIONER

v.

TEXAS

On petition for writ of Certiorari to the Court of Criminal Appeals of the State of Texas.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—February 20, 1967

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1080 and placed on the summary calendar.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 53

JAMES CLEVELAND BURGETT,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

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THE STATE OF TEXAS,

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ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Criminal Appeals of Texas (R. 67-69) is reported at 397 S.W.2d 79.

Jurisdiction

Jurisdiction rests on 28 U.S.C. 1254(1). The opinion of the highest state court in criminal cases was filed on December 15, 1965 (R. 67). A motion for leave to proceed in forma pauperis and petition for writ of certiorari was filed March 3, 1966, and granted February 20, 1967 (R. 70).

Constitutional Provision Involved

Amendment XIV to the Constitution, in pertinent part,

> nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Texas Habitual Criminal Statutes appear in Appendix A.

Questions Presented

1. Whether petitioner's right to counsel can be frustrated through collateral use of void convictions.

2. Whether convictions void on their face for denial of the right to counsel may be used in the presence of the jury without depriving the accused of a fair trial both on guilt and on punishment.

3. Whether an accused must be afforded an opportunity to challenge void convictions before the jury can be prejudiced against him.

4. Whether an accused has the right to be present when the State conducts the voir dire examination of the jury panel to be used at his trial.

5. Whether an accused has the right to a meaningful opportunity to make challenges so that he is tried by a fair and impartial jury.

These rights are all secured by the Fourteenth Amendment.

Statement

Petitioner, an indigent, was tried and convicted of "assault with intent to murder; repetition of offense" and sentenced to the state penitentiary on a jury verdict of ten years (R. 13, 14, 15). His conviction was affirmed on appeal to the Texas Court of Criminal Appeals (R. 67-69). His in forma pauperis, *pro se* motion was granted by this Honorable Court based upon his petition that his trial was held and conviction obtained in violation of rights secured him by the Fourteenth Amendment (R. 70).

Challenged Prior Convictions

In addition to the substantive offense charged, petitioner was indicted as an habitual criminal based upon one alleged Texas conviction for burglary and three alleged Tennessee convictions for forgery, the penalty being life imprisonment (R. 1-4; Art. 63, Vernon's Annotated Texas Penal Code, hereinafter referred to as Penal Code).

This District Attorney filed a pre-trial motion to prevent petitioner's attorney from informing the jury of the penalty which would automatically result if the jury found that petitioner had committed the prior offenses, because this information "might tend to result in a revolt by such jury against the arbitrary penalty of the law" (R. 4, 5). He also moved to require petitioner's counsel to offer any testimony as to penalty "out of the presence or hearing of any member of said jury or jury panel and to allow the Court to rule upon the admissibility of such evidence or testimony out of the presence and hearing of said jury panel" (R. 6).

Defendant's counsel filed a motion to quash the indictment counts on the prior convictions for failure to give notice of what respondent would attempt to prove,[1] but the record is silent as to the court's action (R. 6-9). However, the State did read the indictment to the jury before introducing any evidence, including the counts of the prior convictions (R. 12).

Thereafter, in the presence of the jury, the State offered a certified copy of one Tennessee conviction (R. 36; Resp. Ex. 5; R. 42). Petitioner objected on the grounds that the conviction on its face reflected that petitioner had no counsel in violation of the Fourteenth Amendment (R. 36). The conviction read in part, "Came the Assistant Attorney General for the State and the defendant in proper person and without counsel"; there was no recital of any waiver of his right to counsel (R. 36; Resp. Ex. 5; R. 42, 48). Ruling was reserved (R. 36). The State next offered the same conviction along with the indictment and prison records (R. 36; Resp. Ex. 6; R. 43-48). The second certified copy of the same conviction was inconsistent with the first certified copy, *inter alia*, since the words "and without counsel" were not included, but again there was no recital that petitioner waived his right to counsel (R. 36; Resp. Ex. 6; R. 43-48).[2] Petitioner objected on the same grounds (R. 36). Ruling was reserved (R. 36).

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[1] The reason stated for filing the motion to quash as reflected in the amended motion for new trial overruled by the Court without qualification (R. 18, 19) was so "defendant could establish the admissibility before they were read into the record in the presence of the jury; same reading into the record in the presence of the jury was prejudicial to defendant herein" (R. 18).

[2] See Appendix B for comparison of Exhibits 5 and 6, the inconsistent versions of the same conviction.

The State next offered a Texas indictment which was admitted without objection (R. 37; Resp. Ex. 7, R. 49-50). Then the Texas conviction was marked and discussed in the presence of the jury (R. 37-38; R. 52-55) and apparently admitted (R. 41). A hearing on the Texas conviction was held partly in the absence of the jury (R. 37-41). Upon conclusion, the Court admitted into evidence the second version of the Tennessee conviction (Resp. Ex. 6; R. 43-48), (along with a reference to a third conviction that was never offered into evidence (R. 46; Resp. Ex. 6)) but excluded the Texas conviction (Resp. Ex. 8; R. 52-55) as being void on its face on state law grounds (R. 41).

The next record reference to prior convictions is in the Court's Charge:

> "You are further instructed that the State during the trial of this case offered evidence that might be considered as tending to show the commission of other offenses prior to the 15th day of April, 1964, that all such evidence is withdrawn from you and you will not consider such evidence for any purpose whatsoever in arriving at your verdict. You should not mention or discuss in your deliberations (sic) such evidence or that portion of the indictment read to you attempting to charge such prior offenses." (R. 11-12)

Despite demand for vindication of his right to counsel (Brief in Tex. Crim. App., pp. 4-6), the Court of Criminal Appeals held that since petitioner was not given enhanced punishment [life] and since the above instructions were given, no error was presented (R. 69).

Absence During Voir Dire

On Monday of the week in which petitioner's case was called, another unrelated case went to trial (R. 62, 63-64). The State conducted a voir dire examination of the jury panel (R. 62-63). Petitioner was not given an opportunity to be present during the State's examination (R. 63), although his court-appointed counsel was present to represent the accused in the other trial (R. 62-63). On Thursday petitioner's case was called; he was brought into court for the first time and substantially the same jury panel was used (R. 60, 64-65). The State interrogated only three new veniremen (R. 58), addressing only general remarks to the whole panel (R. 59). Petitioner's counsel was not prohibited from interrogating the jury panel (R. 60). On motion for new trial, petitioner raised the denial of his right to be present during voir dire on state law grounds (R. 16, 17). After a hearing (R. 56-66), the motion was overruled (R. 19). On appeal on citations of state authority (Brief in Tex. Crim. App., pp. 6-9), the Court of Criminal Appeals held that the error was improperly preserved as to form but concluded "If the contention was properly before us for review, no error would be presented" (R. 69).

Summary of Argument

Petitioner was convicted of assault with intent to murder; repetition of offense and sentenced to ten years by a jury. The Court of Criminal Appeals affirmed. Certiorari was granted on Petitioner's Fourteenth Amendment claim that his right to counsel has been twice frustrated and claim that he was denied the right to attend a voir dire examination of his jury by the prosecution.

Petitioner was denied the right to counsel in at least one Tennessee conviction; Texas invoked its habitual criminal statute alleging this conviction and proving it before the jury. Despite a motion to quash and an objection, the jury was informed of four alleged prior convictions at the outset, heard evidence of at least two void convictions (one Tennessee conviction void for denial of counsel; one Texas conviction void on State law grounds) and had the one void Tennessee conviction admitted into evidence—although two convictions are required under State law. The other two alleged convictions were never even offered.

The Tennessee conviction admitted into evidence was void on its face under *Carnley* v. *Cochran,* 369 U.S. 506 (1962), and *Gideon* v. *Wainwright,* 372 U.S. 335 (1963)—as the District Attorney knew or should have known. The habitual criminal charge should never have been used in front of the jury since not even one valid conviction could be proven. *Greer* v. *Beto,* 384 U.S. 269 (1966), conclusively establishes that the Tennessee conviction could not be used for enhancement.

Although the jury had heard all of this "evidence", they were never told that there were no valid convictions against petitioner. Instead, the court gave the sterile instruction not to consider the evidence of prior crimes.

In reviewing petitioner's conviction, the Court of Criminal Appeals applied a "no possible error" standard that violates *Fahy* v. *Connecticut,* 375 U.S. 85 (1962), and *Chapman* v. *California,* 386 U.S. 18 (1967); the proper standard is that the State must prove beyond a reasonable doubt that the unconstitutional evidence did not contribute to the verdict of guilty or to the amount of the punishment assessed by the jury.

The instruction could not "cure" the effect of this needless and prejudicial information under standards long established by this Court. E.g., *Waldron* v. *Waldron*, 156 U.S. 361 (1895).

Spencer v. *Texas*, 385 U.S. 554 (1967), permitting the one-stage habitual criminal charge procedure is not applicable since *Spencer* involved valid convictions while petitioner's does not. There is no legitimate State interest in taking advantage of the denial of the right to counsel, and there is nothing to balance against petitioner's right to a fair jury in this case.

Petitioner is entitled to a fair trial on the issue of guilt and on the issue of punishment. Unless the State can prove beyond a reasonable doubt that the jury would have awarded the same penalty in the absence of knowledge of the prior convictions, the ten year sentence demonstrates the degree of harm to petitioner, for he could have been fined as little as five dollars under the court's charge.

The court has been quick to protect the institution of trial by jury from influences which threaten fairness and impartiality—such as *Turner* v. *Louisiana*, 379 U.S. 466 (1965), *Rideau* v. *Louisiana*, 373 U.S. 723 (1963), and *Parker* v. *Gladden*, 385 U.S. 363 (1967). E.g., if a bailiff's statement, *inter alia*, to one juror that the defendant is a "wicked" fellow taints the jury, so does improper proof of four alleged convictions, two of which were void, and two of which were never even offered into evidence.

Petitioner must have an opportunity to challenge void convictions before the jury is prejudiced. Without overruling *Spencer* and requiring a two-stage trial, relief can be afforded by sanctioning a hearing *in camera*, *Jackson*

v. *Denno,* 378 U.S. 368 (1964), by requiring a pre-trial discovery, *Miller* v. *Pate,* 386 U.S. 1 (1967), or by prohibiting suppression by the State, *Brady* v. *Maryland,* 373 U.S. 83 (1963).

Prejudice on the issue of guilt can be avoided by requiring a two-stage trial—overruling *Spencer.*

Petitioner's right to counsel has been frustrated twice: once when he was convicted in Tennessee without counsel, and once when his Tennessee conviction was used against him in Texas. This double denial of a fundamental constitutional right can only be corrected by a reversal of this conviction.

The alternative ground for reversal involves two independent but related rights. The first is the right of a person charged with a crime to be present throughout his trial, which begins when the work of impaneling the jury begins. *Lewis* v. *United States,* 146 U.S. 370 (1892). The second is the right to hear the State's questions to the jury panel in order to detect prejudice so that intelligent challenges can be made. Deprivation of this right is automatic reversal. *Swain* v. *Alabama,* 380 U.S. 202 (1965).

Petitioner does not know whether he had a fair and impartial jury to begin with, since he was not allowed to be present during the State's voir dire. Even if the jury started out fair, they could not remain fair long, hearing the indictment and the allegations of prior crimes and convictions.

The Court should reverse and remand for a new trial.

I.

Whether Petitioner's Right to Counsel Can Be Frustrated Through Collateral Use of Void Convictions.

1. *The jury was informed of the alleged prior convictions despite petitioner's efforts.*

Petitioner has suffered prejudice from the denial of his right to counsel at least twice—once when he was imprisoned in Tennessee, and now while he is imprisoned in Texas. In order to evaluate this brief, one must understand the peculiarities of the State law.

In Texas, assessing punishment when penalty is not fixed by law is a jury function. So is determination of recidivism. (These were mandatory jury functions at the time of the trial, the reformed Code makes these functions permissive in some cases. Compare Texas Code of Criminal Procedure, Art. 693 with Art. 37.07 of the reformed Code effective January 1, 1966. See, Onion, *Special Commentary*, 3 Vernon's Ann. Tex. Code of Crim. Pro. 629 (1966).)

For a defendant to be convicted as a habitual criminal under Texas law in the circumstances of this case, the State must prove, *inter alia*, two convictions prior to the date of the substantive offense charged (Texas Penal Code, Art. 63). The penalty is mandatory life imprisonment (Texas Penal Code, Art. 63). The State may allege as many prior convictions as it wishes in the indictment, may read the indictment to the jury, and then may prove more than the requisite two, as the District Attorney pleases. *Carso* v. *State*, 375 S.W.2d 297 (Tex. Crim. App. 1963); *Mullins* v. *State*, 409 S.W.2d 869 (Tex. Crim. App. 1966) (Fifteen prior convictions shown).

The trial court does not have to hold a pre-trial hearing on whether the convictions used to invoke the habitual criminal statutes are void. E.g., *McGowen* v. *State,* 290 S.W.2d 521 (Tex. Crim. App. 1956).

Filing a habeas corpus action in the sister state to challenge the underlying prior convictions accomplishes nothing. Not only is the conviction still available for enhancement purposes, but the defendant cannot even inform the jury that he is challenging his prior conviction on constitutional grounds. *Shannon* v. *State,* 338 S.W.2d 462 (Tex. Crim. App. 1960). In petitioner's case, he went to trial on April 29, 1965, on an indictment filed April 7, 1965—hardly time to prosecute a habeas corpus action in Tennessee, assuming that, as an indigent, he had the means of doing so and assuming further that he could surmount the obstacle of mootness. E.g., *Parker* v. *Ellis,* 362 U.S. 574 (1960).

Before petitioner's trial began, his court-appointed counsel filed a "motion to quash" which was the only adaptable procedural step in the then existing Code of Criminal Procedure. See Vernon's Texas CCP (1948) Arts. 504-537; e.g., *Ex parte Brown,* 165 S.W.2d 718 (TCA 1942). The motion was leveled at the prior convictions alleged in order to obtain more information other than the bare allegations. (On motion for new trial, overruled by the Court without qualification, petitioner's counsel stated that the purpose for the motion to quash was in order to determine the admissibility of the prior convictions before trial in order to avoid the prejudice which would result to petitioner if the jury were informed of void convictions.) (R. 18.) However, the record does not indicate that petitioner was accorded any relief on his motion to quash. Not that he could reasonably expect any.

There is no requirement that the evidence of prior convictions be served on defendant, nor is there any requirement that copies be given to the defendant before trial. *Warden* v. *State*, 366 S.W.2d 786 (Tex. Crim. App. 1963); *Roberts* v. *State*, 400 S.W.2d 903 (Tex. Crim. App. 1966). At time of the trial there were no discovery procedures in the Code of Criminal Procedure; motions to suppress evidence were not permitted. E.g., *Padgett* v. *State*, 364 S.W.2d 397 (Tex. Crim. App. 1963); Morrison, *Interpretive Commentary*, 2 Vernon's Texas Code of Criminal Procedure 340 (1966).

The indictment was read to the jury, and the jury was informed that petitioner had been "duly and legally" convicted on four previous occasions (R. 2-3). Only one of the three Tennessee convictions alleged for enhancement purposes was ever offered into evidence (R. 36). (On this record, therefore, we do not know whether the other two Tennessee convictions were also void for denial of right to counsel.)

2. *The conviction used to invoke the habitual criminal statute and admitted into evidence was void for denial of petitioner's right to counsel.*

With regard to the one conviction offered and admitted into evidence, critical observations must be made:

First, the District Attorney had a serious problem. He had two inconsistent versions of the same alleged "valid" conviction.[3] Obviously, both could not be "valid", but having withheld the evidence until offered before the jury, he simply offered both versions into evidence.

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[3] See Appendix B for comparison.

Assuming good faith on the part of the State, neither conviction—or rather neither version of the same conviction—could survive constitutional scrutiny. The State alleged before the jury and offered into evidence a conviction which showed that petitioner had been denied the right to counsel. This conviction was void on its face, as any lawyer—but no juror—knew or should have known.

The District Attorney either overlooked or disregarded the unambiguous holdings of this Court that no man can be deprived of his life or liberty by any state when his right to counsel has been denied.

Over two years before petitioner's trial began, this Court, in *Carnley* v. *Cochran,* 369 U.S. 506 (1962), held:

> "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." 369 U.S. at 516.
>
> • • • • •
>
> "Where . . . the constitutional infirmity of trial without counsel is manifest, and there is not even an allegation, much less a showing, of affirmative waiver, the accused is entitled to relief from his unconstitutional conviction." 369 U.S. at 517.

One version of the conviction offered into evidence expressly stated that petitioner was without counsel. The other version was silent. Neither contained any allegation or recital of waiver of counsel. No other evidence was offered. Therefore, both were void on their face under *Carnley* v. *Cochran, supra,* unless for some reason petitioner had no right to counsel.

But *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), could hardly have escaped the State's attention. *Gideon* established the unequivocal right to counsel for all persons standing accused of a felony in a state court, and this Court's summary reversal in *Pichelsimer* v. *Wainwright,* 375 U.S. 2 (1963) and in *Doughty* v. *Maxwell,* 376 U.S. 202 (1964), established clearly that *Gideon* applied retrospectively to all convictions, since denial of right to counsel infects the very integrity of the fact finding process. *Stovall* v. *Denno,* 87 Sup. Ct. 1967 (1967). See *Linkletter* v. *Walker,* 381 U.S. 618, 628, note 13 (1963); *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966); *Johnson* v. *New Jersey,* 384 U.S. 719, 727 (1966). Thus, the inevitable conclusion, compelled before petitioner ever went to trial, was that the Tennessee conviction was void and was not available to invoke the habitual criminal act.

Contemporaneous and subsequent federal cases have cast no doubt on that conclusion.

The Courts of Appeal have rejected the validity of utilizing pre-*Gideon* convictions void for denial of the right to counsel in recidivist proceedings. *LaNear* v. *LaVallee,* 306 F.2d 417 (CA 2, 1962); *U.S. ex rel. Compton* v. *Wilkins,* 315 F.2d 865 (CA 2, 1963); *Jones* v. *Cunningham,* 319 F.2d 2 (CA 4, 1963); *U.S. ex rel. Durocher* v. *LaVallee,* 330 F.2d 303 (CA 2, *en banc,* 1964); *U.S. ex rel. Baldridge* v. *Pate,* 343 F.2d 537 (CA 7, 1965), 371 F.2d 424 (CA 7, 1966); *Harris* v. *Boles,* 349 F.2d 607 (CA 4, 1965); *Browning* v. *Crouse,* 356 F.2d 178 (CA 10, 1966); *Horne* v. *Peyton,* 356 F.2d 631 (CA 4, 1966). See *U.S. ex rel. Bagley* v. *LaVallee,* 332 F.2d 890 (CA 3, 1965); *Browning* v. *Crouse,* 327 F.2d 529 (CA 10, 1964).

This Court, in *Greer* v. *Beto,* 384 U.S. 269 (1966), summarily reversed a Texas denial of habeas corpus in a recidivist case when the underlying prior conviction was challenged on the denial of right to counsel. The Texas Court of Criminal Appeals thereafter recognized that convictions void for denial of counsel could not be used to invoke the habitual criminal statutes. *Ex parte Hammonds,* 407 S.W. 2d 779 (Tex. Crim. App. 1966); *Ex parte Greer,* 408 S.W.2d 711 (Tex. Crim. App. 1966); *Ex parte Morgan,* 412 S.W.2d 657 (Tex. Crim. App. 1967).

Horne v. *Peyton, supra* at 632, records the commendable Virginia recognition that convictions void for denial of right to counsel are not available for recidivist purposes. Texas displayed candor in the brief in opposition in this case, stating, "Due to the fact that petitioner was not represented by counsel in the Tennessee conviction . . . the State's proof failed. . . ." (Response, p. 3) This concession, though compelled by authority, came too late to protect petitioner's right to a fair trial. Recognition of petitioner's basic Fourteenth Amendment rights should have resulted in abandonment of the habitual criminal charge by the State before the indictment was ever read to the jury.[4] Nevertheless, the conviction was admitted into evidence, despite the motion to quash and despite the objection to the introduction of both versions of the same conviction on grounds that petitioner's right to counsel under the Fourteenth Amendment had been denied.

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[4] Under Article 63, two convictions are required. If the Tennessee convictions had been ruled out before the trial, the enhancement counts would have been quashed. Also, if the State conviction had been ruled out before the trial—instead of during the trial—again the enhancement counts would have been quashed. Only one of the Tennessee convictions alleged was available for enhancement, even if all were valid, because they occurred on the same date. *Mullins* v. *State,* 409 S.W.2d 869 (Tex. Crim. App. 1966).

II.

Whether Convictions Void on Their Face for Denial of the Right to Counsel May Be Used in the Presence of the Jury Without Depriving the Accused of a Fair Trial Both on Guilt and on Punishment.

1. *The State standard for review of the right to a fair trial violated the due process clause.*

The Court of Criminal Appeals rejected petitioner's demand for his Fourteenth Amendment rights, holding, "In view of such instructions by the court and no enhancement having been made as a result of the jury's verdict, no error is presented. . . ." (R. 69; 397 S.W.2d 79, 80) The citations to authority relied upon for this result are based on the fiat that no error is possible unless the penalty has actually been enhanced.

But this conclusion violates the standard set by this Court in *Chapman* v. *California,* 386 U.S. 18 (1967) and *Fahy* v. *Connecticut,* 375 U.S. 85 (1962).

In *Fahy* v. *Connecticut, supra,* the Supreme Court of Errors of Connecticut held that evidence had been used at the defendant's trial which had been obtained by means of an illegal search and seizure, citing *Mapp* v. *Ohio,* 367 U.S. 643 (1961), but that the admission of such evidence was harmless error. This Court reversed and remanded, stating:

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless, and the conviction must be reversed. We are not con-

cerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a *reasonable possibility* that the evidence complained of *might* have contributed to the conviction. . . ." (emphasis added)

In *Chapman* v. *California,* 386 U.S. 18 (1967), this Court relied on *Fahy* v. *Connecticut* in fashioning a harmless constitutional-error rule:

"There is little, if any, difference between our statement in *Fahy* v. *State of Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we do now, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. . . ." (emphasis added)

2. *There is no justification for the State's position which does not violate the due process clause.*

Justification for the Court of Criminal Appeals' position must be based on one or more of the following invalid assumptions:

a. That evidence of prior convictions is not prejudicial on the issue of guilt.

b. That the knowledge of the prior convictions was effectively washed from the brains of the jurors by the trial court's charge.

c. That the petitioner would have received the same punishment assessed by the jury even if the evidence concerning prior convictions had not been brought to their attention.

d. That petitioner shows no harm since the penalty was only assessed at ten years instead of life imprisonment.

Besides violating the *Chapman* and *Fahy* standards, each assumption is intrinsically untenable.

a. The proposition that evidence of prior convictions affects the jury's objectivity in deciding the question of guilt of the primary offense hardly needs empirical documentation.

The *per curiam* reversal of *Leonard* v. *United States*, 378 U.S. 544 (1964) when the jury panel witnessed another jury return a verdict of guilty against the same defendant manifests the recognition by this Court of the prejudicial effect of this information. See also *Marshall* v. *United States*, 360 U.S. 310 (1959).

All permissible uses of prior convictions in evidence generally are intended to reflect on defendant's character. See generally McCormick on Evidence, §§157-158 (1954 ed.); 1 Wigmore on Evidence, §§215-218 (1964 ed.). E.g., when admitted for impeachment purposes, the intended result is to show defendant's bad character to the jury. It is difficult to justify the conclusion that somehow convictions evoke revulsion in the minds of the jurors for some purposes but not for others. In fact, in Texas, it is offi-

cially recognized that the evidence of prior convictions used for enhancement purposes is more than antiseptic—it shows to the jury the defendant's "persistence" in crime. *Ex parte Crawford*, 379 S.W.2d 663 (Tex. Crim. App. 1964).

But perhaps the best evidence of the propensities of jurors comes from the State itself. The State considered the jurors in petitioner's case so fragile of mind that it sought an order from the trial court that the jury not be informed that petitioner would receive a life sentence if convicted. The stated reason for this motion was that the jury might react unfavorably to this arbitrary penalty. Thus, the State wished the jury to know of the prior convictions, but did not think that the jury would be able to be "fair" to the State if they knew the significance (R. 5).

Without the evidence of the void convictions, would the jury have acquitted petitioner altogether? Or, in accordance with the court's charge, would the jury have found petitioner guilty of a lesser included offense, perhaps a misdemeanor? Petitioner's trial lasted one day. Balanced against an additional one day of expense to the State for another trial is up to ten years of petitioner's life, also at State expense, in the state penitentiary. It is manifestly just that the answer to this question be obtained without speculation. As previously demonstrated, petitioner is not required to prove that the jury would have reached a different result. *Chapman* and *Fahy* require the State of Texas to prove beyond a reasonable doubt that petitioner would have been convicted of the highest grade of offense charged and would have been assessed ten years imprisonment even if the jury had never learned of petitioner's prior convictions. This is a heavy burden in this case, and properly so.

b. It is an "unmitigated fiction" that the Court's instruction to the jury to disregard evidence of prior convictions is effective. Cf. *Krulewitch* v. *United States,* 336 U.S. 440, 453 (1949) (concurring opinion of Mr. Justice Jackson). The fiction that the jury will be presumed to disregard unconstitutionally obtained evidence has been rejected in *Jackson* v. *Denno,* 378 U.S. 368 (1964).

Respondent may seek comfort in *Spencer* v. *Texas,* 385 U.S. 554 (1967) holding that the old Texas procedure[5] in habitual criminal cases does not violate the Fourteenth Amendment by allowing the jury to be advised of prior convictions before passing on guilt or innocence on the current offense when an adequate instruction is given.

The Court recognized the potentiality for prejudice but found the prejudice outweighed by a valid State purpose. But here the State has no legitimate interest in violating the Fourteenth Amendment rights of petitioner nor of being a beneficiary of another state's violation of petitioner's rights.

Spencer's case is not petitioner's case for the simple reason that *Spencer* involved *valid* prior convictions; petitioner's case does not.

The opinion in *Spencer* balanced the legitimate State interest in punishing recidivists against the defendant's right to a fair and impartial jury. In petitioner's case, there is nothing to balance against petitioner's right to a fair jury. There is no legitimate State interest in taking advantage of the denial of the right to counsel, either in

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[5] This procedure was reformed effective January 1, 1966. Art. 37.07, Vernon's Ann. Texas Code of Crim. Pro.

depriving him of his liberty in the first instance, or in using the conviction against him in a subsequent proceeding.

Furthermore, this Court has long recognized that some evidence, first admitted and then withdrawn, is so prejudicial that even a firm instruction to the jury to disregard will be ineffective.

> "The general rule is that if evidence which may have been taken in the course of a trial, be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction. . . . But yet there may be instances where such a strong impression has been made upon the minds of the jury by illegal and improper testimony, and that its subsequent withdrawal will not remove the effect caused by its admission, and in that case the general objection may avail on appeal or writ of error." *Throckmorton* v. *Holt,* 180 U.S. 552, 567 (1907); see *Hopt* v. *Utah,* 120 U.S. 430, 438 (1887).

In *Waldron* v. *Waldron,* 156 U.S. 361 (1895), this Court reversed and remanded for a new trial because a party's character had been improperly questioned by evidence of adultery, even though the trial court firmly instructed the jury to disregard, stating:

> "There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not considering the whole case and its particular circumstances, the error committed appears to have been

> of so serious a nature that it must have affected the minds of the jury despite the correction by the court." 156 U.S. at 383.

See *Tipton* v. *Socony Mobil,* 375 U.S. 34 (1963) (reversal despite limiting instruction when jury informed of workmen's compensation insurance when a worker was trying to obtain damages for his injuries).

The Courts of Appeals have been applying this principle steadily in reversing criminal convictions. E.g., *Lawrence* v. *United States,* 357 F.2d 434 (CA 10, 1966); *United States* v. *Clarke,* 343 F.2d 90 (CA 3, 1965); *United States* v. *De Dominicis,* 332 F.2d 207 (CA 2, 1964); *Helton* v. *United States,* 221 F.2d 338 (CA 5, 1955).

This is particularly appropriate in reviewing a Texas case because even when jurors consciously disregard instructions limiting use of evidence, the Court of Criminal Appeals does not necessarily provide a new trial. *Gonzales* v. *State,* 398 S.W.2d 132 (Tex. Crim. App. 1960).

Yet, even the Court of Criminal Appeals consistently holds that evidence of extraneous offenses is so prejudicial that an instruction to disregard is not a cure in non-recidivist proceedings. E.g., *Lucas* v. *State,* 378 S.W.2d 340 (Tex. Crim. App. 1964); *Priest* v. *State,* 282 S.W.2d 390 (Tex. Crim. App. 1955).

c. & d. Finally, any assumption that petitioner would have received the same sentence if the unconstitutionally obtained evidence had not been admitted transcends speculation and approaches divination. And the assumption of "lack of harm" because petitioner was assessed only ten years instead of life imprisonment ignores reality. Peti-

tioner could have received as little as a five dollar fine under the court's charge (R. 11).

In a state where murder can be punished by the jury with as little as two years probation, ten years imprisonment for assault with intent to murder does not appear to be a gratuity to petitioner. Vernon's Ann. Texas Pen. Code, Art. 1257, 1257a; Vernon's Ann. Texas Code of Crim. Pro., Art. 42.12.

Petitioner is entitled to as fair a hearing on the issue of punishment as on the issue of guilt. See *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The Second Circuit, *en banc*, has already held that a defendant whose punishment is not enhanced nevertheless suffers prejudice on the issue of punishment when a void prior conviction taints his hearing. *U. S. ex rel. Durocher* v. *LaVallee*, 330 F.2d 303, 305, n. 2 (CA 2, *en banc*, 1963). He is entitled to a hearing free from consideration of his void prior conviction.

3. *The integrity of the jury system cannot tolerate this threat to fairness and impartiality.*

Whenever the integrity of the jury system is threatened, prophylactic measures have been taken without delay for a quantitative analysis of the possible harm. See, e.g., *Rideau* v. *Louisiana*, 373 U.S. 723 (1963); *Turner* v. *Louisiana*, 379 U.S. 466 (1965); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Parker* v. *Gladden*, 385 U.S. 363 (1967). This case calls for equal treatment. If mere exposure of the jury to bailiffs who were witnesses (*Turner*), if a comment to one juror by a bailiff that the defendant is wicked and to two others that the Supreme Court will correct any errors

(*Parker*), if three jurors witnessing a televised confession (*Rideau*), taints the whole jury—as it clearly does—then a fortiori wanton exposure to four convictions taints the jury.

III.

Whether an Accused Must Be Afforded an Opportunity to Challenge Void Convictions Before the Jury Can Be Prejudiced Against Him.

1. *Prejudice can be avoided without requiring a two-stage trial.*

It is not necessary to overrule *Spencer* v. *Texas, supra,* permitting a one-stage trial procedure in recidivist cases. Regardless of the procedural device used in informing the jury of void convictions—whether it be a one-stage trial, a two-stage trial, or a separate trial—petitioner and all victims of the deprivation of right to counsel suffer. A conviction void on its face for denial of the right to counsel should never be brought to the jury's attention.

To afford petitioner an opportunity to vindicate his right to counsel, the State may select from any number of procedural safeguards. Among them are procedures already sanctioned by this Court:

a. Simple procedural protection, similar to that afforded by *Jackson* v. *Denno* (although rejected in *Spencer* v. *Texas, supra,* on other grounds), would suffice to prevent the unconscionable as well as the mistaken efforts to use a void prior conviction against a man accused of another crime. In petitioner's case, an *in camera* hearing was held before the jury was informed of petitioner's "confession"

without disrupting proceedings unduly; in fact, the jury never was informed of petitioner's confession since the court found that physical and mental coercion had been inflicted on petitioner. Also, a partial hearing *in camera* was held on the issue of void State convictions.

As a corollary to the State's right to prevent defendant's counsel from informing the jury of the punishment under the habitual criminal statute, e.g., *Buhl* v. *State,* 387 S.W. 2d 677, 678 (Tex. Crim. App. 1965); *Preble* v. *State,* 374 S.W.2d 444, 445 (Tex. Crim. App. 1963), the State demanded in petitioner's case that any such evidence petitioner wished to offer first be presented to the court out of the hearing of the jury (R. 5, 6).

It is oppressive for the State to demand a hearing *in camera* for itself *before* evidence is offered and then deny a like opportunity for the defendant. While "sauce for the goose" may not be a constitutional standard, it is so naturally fair that even kindergarten children can understand and appreciate it.

Under Texas law, it is already the court's function and duty to examine the conviction to see that it is valid for enhancement purposes. The jury's function is simply to pass on the "historical fact" of identity between the person previously convicted and the person now charged with crime. E.g., *Doby* v. *State,* 383 S.W.2d 418 (Tex. Crim. App. 1964). Unless identity is an issue, there is no justification for informing the jury at all.

Thus, existing procedures—if made available to defendants on equal terms with the State—would guarantee that the jury is not prejudiced by the use of unconstitutionally obtained convictions.

Since January, 1966, the State no longer requires that all objections to evidence be made at the time of offer before the jury; the courts *may* now entertain motions to suppress. Vernon's Ann. Tex. Code of Crim. Pro. 28.01(6), Morrison, *Interpretive Commentary*, 2 Vernon's Ann. Tex. Code of Crim. Pro. 340 (1966); *Padgett* v. *State*, 364 S.W.2d 397 (Tex. Crim. App. 1963). Before 1966, the courts sometimes held hearings *in camera* to determine whether the conviction was void—but only *after* the convictions had been offered into evidence. See, e.g., *Doby* v. *State*, 383 S.W.2d 418 (Tex. Crim. App. 1964). A minor change in procedure would adequately protect petitioner's rights: all that is required is the right to a hearing *before* the evidence is called to the jury's attention.

b. A recognition of the right to pre-trial examination of the prior conviction to be offered by the State as part of the "tangible evidence" within the holding of *Miller* v. *Pate*, 386 U.S. 1 (1967) would suffice. There, as here, the defendants sought access to tangible evidence before trial, only to be denied any opportunity to do anything other than to object when the State offered the evidence. There "bloodstained" underwear turned out to be paint when defendant finally was afforded an opportunity to inspect the evidence out of the presence of the jury. Here a "valid" prior conviction turned out to be void on its face.

c. Furthermore, petitioner's request for more information made prior to trial in his motion to quash invoked the mandatory duty of the prosecutor to furnish petitioner evidence which was relevant not only to the issue of guilt but also evidence relevant to the issue of punishment. *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). No evidence was more relevant to punishment than the evi-

dence the State intended to offer on prior convictions, yet this was withheld despite demand.

State denial of the opportunity for petitioner's counsel to inspect and to object to the alleged prior convictions proves the wisdom of the Court's decision in *Reynolds* v. *Cochran,* 365 U.S. 525 (1961). There a motion for continuance to obtain counsel was denied, and no counsel had an opportunity to challenge the prior convictions. Reversing, the Court noted that "we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple offender proceeding". 365 U.S. at 531. In petitioner's case, the Court is assured that petitioner's counsel would have found the defects had he just been given the opportunity.

2. *Prejudice on the issue of guilt can be avoided by requiring a two-stage trial.*

While petitioner need not necessarily petition this Court to reconsider *Spencer,* it is pertinent to note that had a two-stage trial procedure been available to him, he would have had an opportunity for a trial on the issue of guilt without having to surmount the information in the jury's mind about four prior convictions. This provides an alternative basis for reversal of petitioner's conviction.

The Chief Justice's dissenting opinion observes, "Only seventeen states still maintain the needlessly prejudicial procedure exemplified in these three cases. The decision I propose would require only a small number of states to make a relatively minor adjustment in their criminal procedure to avoid the manifest unfairness and prejudice which has already been eliminated in England and in thirty-three of the United States."

Petitioner's right to counsel has been frustrated twice —once when he was convicted in Tennessee without counsel; once when his Tennessee conviction was used against him in Texas. This double denial of a fundamental constitutional right can only be corrected by a reversal of his conviction, for which he prays.

IV.

Whether an Accused Has the Right to Be Present When the State Conducts the Voir Dire Examination of the Jury Panel to Be Used at His Trial.

V.

Whether an Accused Has the Right to a Meaningful Opportunity to Make Challenges So That He Is Tried by a Fair and Impartial Jury.

On Monday of the week of petitioner's trial, the State conducted a voir dire examination of the jury panel (R. 62-63). Petitioner was not present during this examination, although by chance his appointed lawyer was there (R. 62-63). His appointed lawyer was there because he was defending another accused (R. 62). On Thursday of that week, petitioner was brought to court for the first time and only three new members of the panel were individually interrogated in his presence by the prosecution (R. 58, 60, 64-65).

There are two related but separate rights to protect under the Fourteenth Amendment.

The first is the right to attend all phases of one's own trial. "He shall be personally present at the trial, that is, at every stage of the trial when his substantial rights

may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution." *Hopt* v. *Utah*, 110 U.S. 579 (1884). And the trial begins "when the work of impaneling the jury begins". *Lewis* v. *United States*, 146 U.S. 370, 374 (1892); *Hopt* v. *Utah*, 110 U.S. 574, 578 (1884). See *Swabb* v. *Berggren*, 143 U.S. 442, 448 (1891) (" . . . the personal presence of the accused from beginning to end of the trial for a felony involving life or liberty . . . must be assumed to be vital to the proper conduct of his defense and cannot be dispensed with"). His absence can be tolerated only when his rights cannot be affected. E.g., *Snyder* v. *Massachusetts*, 291 U.S. 97 (1933).

The second is the right to exercise meaningful challenges so that the jury is fair and impartial.

Both rights were denied petitioner, since he was not allowed to be present when the State conducted the voir dire examination of the entire jury panel.

It would be difficult to find an experienced trial lawyer who would take the position that the voir dire examination of the jury is not a crucial part of the trial. The reaction of a prospective juror to the questions of the District Attorney provide significant, often vital, information upon which to base peremptory challenges or challenges for cause. This Court has recognized that "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories and the process of selecting a jury protracted . . . the [peremptory] challenge is 'one of the most important of the rights secured to the accused,' . . . *the denial or impairment of the right is reversible error without a showing*

of prejudice," *Swaine* v. *Alabama,* 380 U.S. 202, 218, 219 (1965) [emphasis added].

Even Courts of Appeals have the duty to examine the voir dire examination of the jury in order to be certain that a prejudiced jury did not sit in judgment on a case. *Irwin* v. *Dowd,* 366 U.S. 717, 723 (1961). But petitioner doesn't even know what his jurors said on voir dire; he wasn't there.

Perhaps some effort will be made to contend that petitioner's court-appointed counsel waived this right for him, since petitioner's counsel happened to be present at the time of the voir dire. However, petitioner's counsel was not there to represent petitioner; he was there to represent another client. His loyalty at the time was directed toward the other client, and properly so. Even if petitioner's court-appointed counsel was there to represent petitioner, this Court has already held that the participation by counsel only in the selection of jurors will not suffice. *Lewis* v. *United States,* 146 U.S. 370, 374 (1892). This is so because the petitioner's "life or liberty may depend upon the aid which, by his personal presence, he may give to counsel . . . in the selection of jurors." 146 U.S. 370 at 373; *Hopt* v. *Utah,* 110 U.S. 574, 578, 579.

The accused cannot participate effectively in making challenges unless he is present at the voir dire of the jury panel by the prosecution. The accused must be given the opportunity to observe the jury while the prosecution asks questions in order that he might form more complete opinions and detect possible prejudice in potential jurors, and on that basis of these and other observations, consult with his counsel in making effective peremptory challenges.

Either petitioner has the right to be present during the voir dire examination of the jury by the State, or no defendant in a criminal case has that right. The client has the right to confer with his own attorney in exercising challenges. The mere fact that petitioner was an indigent who had no choice in his counsel does not give the petitioner any less right in this vital procedure. Petitioner's right to be present during his trial having been violated, a new trial is now his right.

This is a plain error which cannot be deemed waived either by the defendant or his counsel when the statute requires his presence. *Lewis* v. *United States,* 146 U.S. 370, 373; *Hopt* v. *Utah,* 110 U.S. 574, 579; *Thompson* v. *Utah,* 170 U.S. 343 (1898); Art. 580, Vernon's Texas Code of Crim. Pro. (1948); Art. 33.03, Vernon's Ann. Texas Code of Crim. Pro. (1966).

Subsequent cases have permitted express waivers, but there are none in this case. To the contrary, waiver by petitioner was denied on motion for new trial (R. 17) where under State law the issue of absence can be raised. Art. 753, Vernon's Tex. Code of Crim. Pro. (1948); Art. 40.03, Vernon's Ann. Tex. Code of Crim. Pro. (1966).

Conclusion

The judgment of the Court of Criminal Appeals should be reversed and remanded for a new trial, or, in the alternative, to afford the Court of Criminal Appeals an opportunity to apply the correct appellate standard of review.

Respectfully submitted,

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APPENDIX A

Texas Habitual Criminal Statutes

(1) Article 63 is involved in this case:

"Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

(2) Other statutes:

Article 61:

"If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense, he shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases."

Article 62:

"If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 64:

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

APPENDIX B

Comparison of Certified Judgments of Same Conviction State's Exhibits 5 and 6

[ ] indicate omissions in 6
(italics) indicate additions in 6

No. 6711

THE STATE OF TENNESSEE,

vs.

JAMES BURGETT.

Came the [Assistant] Attorney-General for (*on the part of*) the State and the Defendant in proper person [and without counsel]. [The Defendant being charged and arraigned hereon pleads guilty to a charge of forgery. Thereupon a jury of good and lawful men, citizens of Maury County, Tennessee, was duly elected and impaneled, to-wit:] (*who being arraigned at the bar of the Court, and charged on the bill of indictment, pleads guilty to the same ((and for his trial puts himself upon the country, and the attorney-general doth the like)), when to try the issue thus joined between the State of Tennessee and the Defendant James Burgett came a jury of good and lawful men, who had been duly elected, tried and sworn to well and truly try said issue of facts joined between the State of Tennessee and said Defendant James Burgett, and fix the punishment of said Defendant; said jury being composed of the following, to-wit:*)

Charlie Hood
B. S. Jackson
Elbert Elmm
Joe Scannella (*Seannella*)
W. R. Greenfield
Clarence Dodd
English Gibson
Richard Lindsey
Mack Hardison
F. A. Connelly
H. B. Littlejohn
C. B. Dodson

[who were charged and sworn in all things to well and truly try the issues joined between the State of Tennessee as the Plaintiff and James Burgett as the Defendant; upon a plea of guilty to a charge of forgery and a true verdict render according to the law and the evidence.

Without leaving the jury box and upon the recommendation of the Assistant Attorney-General, the jurors aforesaid upon their oaths aforesaid did say, "We, the jury, find the Defendant guilty as charged and recommend that his punishment be fixed at nor (sic) more than three years in the State Penitentiary".]

(*After said jury had heard the evidence, argument of counsel and the charge of the court, they retired to consider of their verdict, and they then returned into open court, and they said, according to their oath to make a true deliverance, and fix the punishment, according to their charge, that they find the Defendant guilty of forgery, and fix his punishment at three years in the penitentiary house of this State. Whereupon the Court proceeded to pass sentence upon the Defendant, according to the finding of said jury, that is the Defendant shall serve an indeterminate sentence of not less than three years, nor more than three years in said penitentiary house to run concurrently with No. 6709, that said Defendant be rendered infamous, and in-*

capable of giving evidence in any of the courts of this State, or of exercising the privilege of the elective franchise; that he pay the cost of this prosecution, for which execution will issue.)

[Whereupon it is ordered by the Court that Defendant be confined at hard labor in the State Penitentiary for a period of not less than three (3) nor more than three (3) years and that he pay all the costs of this cause for which execution may issue. It is further ordered that the sentence in this case run concurrently with the sentence in Case No. 6709.

Order that he be remanded to jail subject to the orders of the Warden of the State Penitentiary. SS: Joe M. Ingram, Judge]

NO. 53

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

JAMES CLEVELAND BURGETT,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas is reported in 397 S.W.2d 79 (Appendix "A").

JURISDICTION

Petitioner seeks jurisdiction under 28 U.S.C. 1254(1) and the Fourteenth Amendment to the Constitution of the United States.

The State respectfully submits that this Honorable Court should not take jurisdiction, because no Federal

question is presented. Less than a year ago, this Court so held in *Spencer v. The State of Texas,* 385 U.S. 554, 87 S.Ct. 648.

QUESTIONS PRESENTED

1. The main question for this Court to decide is whether evidence of prior convictions, not shown to to be void, offered into evidence but withdrawn from the jury presents a Federal question.

2. Whether petitioner with a pending case is entitled as a matter of right to sit in the court room when the jury panel is being questioned on a totally unrelated case.

STATEMENT

The proof showed that Burgett was in the Hunt County jail. After the jailer permitted him to make a telephone call, he attacked the jailer with a knife.

Burgett was indicted for assault with intent to murder with malice with four prior felony convictions alleged for enhancement purposes under Article 63, *Vernon's Annotated Texas Penal Code* (Appendix "B"). The district attorney offered records of a Tennessee conviction for forgery and a Dallas County, Texas, conviction for burglary with intent to commit theft. The trial court did not admit the Texas conviction (State's Exhibit 8, R. 41, 52), and the evidence of the Tennessee conviction was withdrawn from the jury (R. 11-12). No prior conviction was used to enhance punishment.

Petitioner did not make a motion to quash the indictment on the grounds that the prior convictions

were void. Such was available under Article 760e, *Vernon's Annotated Code of Criminal Procedure,* Acts 51st Leg., p. 817, Ch. 463, Sec. 1 (Appendix "C"). Facts could have been developed on the issue prior to trial. Article 759a, Sec. 6, *Vernon's Annotated Code of Criminal Procedure,* Acts 1951, 52nd Leg., p. 819, Ch. 465 (Appendix "C"). The only motion to quash was on the ground that it was not known what the State expected to prove.

ABSENCE DURING VOIR DIRE

Burgett was in the court room during all of the voir dire examination of the jury. His counsel correctly points out in his brief that the trial was held on Thursday. On Monday of that week an unrelated case went to trial. Counsel for petitioner participated in that case (R. 62-63). Petitioner's counsel was not prohibited from interrogating the jury panel (R. 60). The opinion of the Court of Criminal Appeals (Appendix "A") correctly sets out what transpired.

ARGUMENT

Burgett was convicted for assault with intent to murder with malice. There was no enhancement of penalty. No prior conviction nor "repetition of offense" was submitted to the jury. The court in its charge instructed the jury:

> "You are further instructed that the State during the trial of the case offered evidence that might be considered as tending to show the commission of other offenses prior to the 15th day of April, 1964, that all such evidence is withdrawn from you and you will not consider such evidence for any purpose whatsoever in arriving

at your verdict. You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you attempting to charge such prior offenses." (R. 11-12)

The penalty for assault with intent to murder with malice is set out in Article 1160, *Vernon's Annotated Texas Penal Code* (Appendix "E") and is not less than two nor more than twenty-five years (as amended, Acts 1961, 57th Leg., Ch. 331, p. 706).

If one prior conviction of petitioner had been successfully used, the penalty would have been, as a matter of law, twenty-five years. Article 62, *Vernon's Annotated Texas Penal Code* (Appendix "F").

The opinion of the Court of Criminal Appeals stated that no bad faith was shown on the part of the district attorney in offering evidence of prior convictions. The State offered to stipulate the prior convictions out of the presence of the jury, but respondent would not agree. An incorrect ruling by the trial court in sustaining the objection to the burglary conviction prevented the State from going forward with proof of the Tennessee convictions. The record does not show the convictions to be invalid.

When the evidence of the Dallas County conviction was offered, objection was sustained by the trial court on the grounds that the sentence read "not less than 2 nor more than 33 years." The certified record at page 83 will show that one of the 3's was very dim and apparently was intended to be erased. When the record was printed, the sentence read "not less than 2 nor more than 3 years" (R. 54). Even though the sentence might have been read "not less than 2 nor more than 33 years," it could have been reformed

on appeal. Article 847, *Vernon's Annotated Code of Criminal Procedure,* 1925 (Appendix "G"), which was in effect at the time of this trial. It was definitely shown in the judgment the penalty assessed. The Court of Criminal Appeals has held that where a judgment and sentence could have been reformed on appeal it could not be attacked collaterally on habeas corpus. *Ex Parte Pitrucha* (1953), 158 Tex.Cr.R. 426, 256 S.W.2d 415.

In *Palacio v. State* (1957), 164 Tex.Cr.R. 400, 299 S.W. 2d 944, the verdict and judgment showed the penalty assessed was seven years. The sentence read "not less than 2 nor more than 5." The sentence was reformed on appeal to read "not less than 2 nor more than 7."

The indictment shows that all of the forgery convictions in Tennessee were on the same date, and the State could not use them under Article 63 of the *Penal Code* (the habitual criminal statute) (Appendix "B"). In order to invoke the provisions of this Article, it is necessary that each succeeding conviction be subsequent to the previous conviction, both in point of time of the commission of the offense and the conviction therefor. *Cowan v. State* (1962), 172 Tex.Cr.R. 183, 355 S.W.2d 521.

Article 62 of the *Penal Code* (Appendix "F") prevented the use of the Tennessee convictions, or either of them, because they were for forgery and were not of the same nature as the primary offense in this case, which was assault with intent to murder. The State could not, as a matter of law, proceed with the Tennesee convictions after the trial court had erroneously ruled out the Dallas County conviction. When the Dal-

las County conviction was ruled out, no motion for mistrial was made.

Petitioner assumes that the Tennessee conviction was void, because one of the instruments shows that he was without counsel (State's Exhibit 5, R. 42, and State's Exhibit 6, R. 43).

The present case was tried on April 29, 1965, prior to *Greer v. Beto,* 384 U.S. 69, 86 S.Ct. 1477, which was decided by this Court on May 23, 1965.

There has been no showing that Burgett was indigent at the time of trial. Petitioner did not have counsel during the trial. The fact that a judgment is silent as to counsel does not of itself show non-waiver.

The law and the practice in Tennessee regarding counsel make a strong presumption for the validity of the prior convictions. As far back as 1855, Tennessee statutes required appointment of counsel if an accused was unable to employ counsel. Apparently this was true even in misdemeanors.

Sec. 40-2002, Chapt. 20, p. 481, of the *Tennessee Code Annotated,* 1956, reads as follows:

> "Every person accused of any crime or misdemeanor whatsoever, is entitled to counsel in all matters necessary for his defense, as well as to facts as to law."

Sec. 40-2003 reads:

> "If unable to employ counsel, he is entitled to have counsel appointed by the court."

In *Polk v. State* (1936), 170 Tenn. 370, 94 S.W.2d 394, the Supreme Court of Tennessee reversed a judg-

ment, because, among other grounds, a justice of the peace at arraignment did not advise accuseds of their right to aid of counsel in every stage of the proceeding in accordance with the Constitution and statutes.

In the case of *Cogdell v. State* (1951), 246 S.W.2d 5, the Supreme Court of Tennessee cited *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 1023, where it was stated in an opinion by Mr. Justice Black:

> "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

The case of *Snell v. United States* (10th Cir.), 174 F.2d 580, 581, was cited. It held a duty is imposed on the trial judge to determine whether there has been a competent and intelligent waiver by the accused.

Very few cases are found contending right to counsel during the trial has been denied.

In *Melton v. Bomar* (1957), 201 Tenn. 453, 300 S.W. 2d 875, habeas corpus was denied, because, if there was a conflict of interest between two defendants, separate counsel was appointed to defend Melton. *Johnson v. State* (1963), 213 Tenn. 372, 372 S.W. 2d 192, was reversed because one attorney withdrew and newly appointed counsel did not have sufficient time to prepare for trial.

Chandler v. Fretag (1954), 348 U.S. 3, 75 S.Ct. 1, was tried in Tennessee. It was reversed. The accused stated he did not want counsel. When he was first notified at the trial that he was being tried as an ha-

bitual criminal, he asked for counsel; his request was denied.

Other Tennessee cases have not been found by the writer concerning denial of counsel at the time of trial. This would indicate a denial of right to counsel is not a problem in that state. A check of the opinions of the 6th Circuit, Vols. 305 through 374 F.2d shows no cases reversed because of lack of counsel. Some two or three were reversed because counsel was not given adequate time to prepare for trial.

Two Law Review articles indicate that the spirit of the Constitution and statutes of Tennessee is being followed. 31 *Tenn. Law Review* 300, "The Right to Counsel for the Indigent Defendant in Tennessee"; 30 *Tenn. Law Review* 420, "The Right to Counsel in Criminal Prosecutions."

Since 1965, Tennessee has required waiver of counsel to be in writing. Sec. 2, Chapt. 217, p. 646, *Public Acts of the State of Tennessee,* 84th General Assembly, 1965, provides:

> "Be it further enacted, That no person in this state shall be allowed to enter a plea to an indictment or presentment charging a felony when such person is not represented by counsel, unless such person has in writing expressly waived his right to the assistance of counsel."

The rule in *Carnley v. Cochran,* 369 U.S. 506, 82 S.Ct. 884, and *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, is recognized, but these were attacks on lower court judgments squarely before this Court, not on a collateral prior conviction judgment. To require proof of waiver of counsel and other constitutional rights in previous convictions (especially out of state convic-

tions) would in most instances make our recidivist statutes ineffective, and it would be tantamount to requiring a new trial or retrial of practically all prior convictions.

Many printed forms of judgments recite that a defendant and his counsel were present. If a judgment used as a prior conviction for enhancement or for impeachment purposes recited counsel present and was offered by the State and objection was made for the first time that there was actually no counsel present, petitioner's contention, if upheld, would require a reversal even though it was offered in good faith.

It is possible that Burgett wanted to represent himself, that he did not want counsel. He did a creditable job in getting this Court to grant the writ of certiorari. Of course, counsel cannot be forced upon him. *Carter v. People of Illinois,* 329 U.S. 173, 174, 67 S.Ct. 216, 218; *Moore v. State of Michigan,* 355 U.S. 155, 161, 78 S.Ct. 191, 195.

It should be remembered the court instructed the jury not to consider any of the prior convictions, including the Tennessee conviction, and they were not used. The instruction was presumed to have been followed. *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648.

In *Rice v. Olson,* 324 U.S. 786, 65 S.Ct. at 990, a plea of guilty was entered in a burglary trial; it was contended he was not advised of his right to assistance of counsel and had not waived that right. This Court denied relief and ordered a hearing on waiver. In the present case, there was a plea of guilty. Burgett says he did not have counsel; he does not claim he had not waived that right. Here, as in *Rice v. Olson,* there was

a guilty plea in a state which has required appointment of counsel when an accused was unable to employ one. Counsel was actually waived (Appendix "J").

No hearing should be required, because the matter was withdrawn from the jury.

Petitioner contends that there was no opportunity to challenge the prior convictions prior to the trial on the merits. He cites *McGowen v. State* (1956), 163 Tex.Cr.R. 587, 290 S.W.2d 521. This case does not support his contenton, because it merely held that the trial court did not err in not postponing the trial so the prior convictions could be attacked by habeas corpus. It was held as a matter of law that the former conviction was not invalid. It is submitted by the State that a motion to quash the indictment or that part of the indictment alleging the prior convictions could have been attacked under Article 760e and Article 759a, Sec. 6, of the *Code of Criminal Procedure* (Appendices "C" and "D"). No attempt was made to do so. For the first time in the motion for new trial, he stated that his motion to quash the indictment was to challenge the prior convictions. This was never mentioned prior to the verdict of guilty. This procedure, if permitted, would allow a free ride on the first trial with an assurance of reversal if found guilty.

Petitioner complains that Texas has no procedure to suppress evidence. At the time of the trial, this was true, but, as heretofore pointed out, he had the procedure to quash the indictment. Since January 1, 1966, Texas has had a motion to suppress evidence, Article 28.01, *Code of Criminal Procedure,* 1965 (Appendix "H"). Also, it is pointed out in *Spencer v.*

Texas that records of prior convictions of felonies less than capital have not been read to the jury prior to the finding of guilt under Article 30.07, *Code of Criminal Procedure* (January 1, 1966). Now, even in capital cases, prior convictions are not made known to the jury until the penalty trial. Article 37.07, *Code of Criminal Procedure* (as amended, effective August 28, 1967, Appendix "I").

Complaint is made that the trial court, upon the motion of the district attorney, instructed counsel for petitioner not to mention the penalty of life under the habitual criminal statute. Of course, that went out of the case when the trial court instructed the jury not to consider the Dallas County and Tennessee convictions. No harm is shown petitioner. If one is found guilty of the primary offense and two prior convictions, his penalty is automatically assessed at life. The jury has nothing to do with the assessment of punishment. If this contention is held to be with merit, then in a state proceeding where the court assesses the penalty or in a Federal criminal trial counsel for a defendant could, in effect, tell the jury not to convict because of the large penalty the courts could assess. It is submitted that this complaint is without merit.

The State further submits that no harm is shown. Burgett received only ten years; the jury knew, or must have known, that he was being held on another offense, because he was in jail when he was permitted to make a telephone call, and on the way back to his cell he attacked the jailer with a knife and attempted to escape. Under this record, life could have been assessed.

Petitioner contended that he should have been pres-

ent when the voir dire examination of the jury panel was being conducted in a totally unrelated case on Monday when his case was not tried until Thursday. The opinion of the Court of Criminal Appeals and the statement of petitioner as to what transpired are correct.

The State submits that to adopt this contention every prisoner or accused subject to having his case heard by part of the jury panel would have to be brought to the court room during all voir dire examination of other trials. No rights of Burgett were violated. See *Welch v. Holman* (1965, M. D. Ala., N. D.), 246 F. Supp. 971.

CONCLUSION

The respondent, the State of Texas, submits that there is no substantial Federal question, that the prior convictions complained of were not used in evidence. The court instructed the jury not to consider them. An incorrect ruling by the trial court prevented the State from going forward with the Tennessee conviction. No harm was shown to petitioner, because he could have received life imprisonment instead of ten years.

This Court did not have the full record before it when certiorari was granted. Since no substantial Federal question nor due process issue is presented, it is respectfully submitted that this Court should hold that the writ of certiorari was improvidently granted. *Phillips v. New York,* 362 U.S. 456; *Atchley v. California,* 366 U.S. 207; and *Baldonado v. California,* 366 U.S. 417.

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APPENDIX "A"

James Cleveland (Jimmy) Burgett, Appellant
No. 38,860, v. Appeal from Hunt County
The State of Texas, Appellee

OPINION

The offense is assault with intent to murder; the punishment, ten years.

The state's evidence shows that the prosecuting witness, Weldon E. Bradley, was a deputy sheriff in charge of the jail in Hunt County. Appellant was a prisoner and inmate in the jail.

Bradley testified that on the day in question appellant called him around 5 p.m. and said that he wanted to use the telephone. Thereupon, the witness went to appellant's cell and brought him out to the office area, where he used the telephone. After the call was completed, Bradley started back to the cell with appellant. When he stopped at a control box, appellant attacked him with a knife, and a scuffle ensued between them. In describing the assault committed upon him by appellant, Officer Bradley testified as follows:

> "Well he was cutting at my throat three or four times with the knife * * *
>
> "He was swinging like this.
>
> "* * * he was standing in front of me then and he was just swinging in an arc like that."

He further stated that the knife was traveling at a fast rate of speed when being swung at his throat and that he was in fear of his life, and also that appellant's thrusts with the knife were from the witness's left ear to under his chin and that he received a wound be-

hind the left ear about 1¼ inches long and ⅛ inch deep. The officer further testified that before appellant was subdued he "slid the knife down and said, "'I give up.'" The knife was then recovered by a trusty and was introduced in evidence at the trial as state's exhibit No. 4. The knife, as described in the testimony, was shown to have a blade approximately 1¾ inches in length and sharp enough to cut a person.

Dr. James E. Nicholson, upon being called as a witness by the state, testified that there were certain vital organs in the neck of a human being, including the jugular vein, and, based upon a hypothetical question describing the assault made by appellant upon the officer, expressed the opinion that it was made with a means calculated to produce death. The doctor further testified that had such an arc with the knife as described been slightly deeper it could have produced death by severing the jugular vein.

Appellant did not testify but called his cell mate as a witness who gave no testimony which shed any light on the manner of the assault.

Appellant predicates his appeal upon eight points of error.

Points of error Nos. one through seven present appellant's contentions that the court erred in overruling his motion to quash certain paragraphs in the indictment alleging prior convictions for the purpose of enhancement, and in permitting the state to read such allegations to the jury. Complaint is also made to the admission in evidence, over appellant's objection, to certain records offered by the state in proof of some of the prior alleged convictions.

The record reflects that no action was taken by the court on appellant's motion to quash the enhancement allegations in the indictment. The record further shows that while the court permitted the state to offer proof as to some of them, the truth or falsity of the enhancement allegations was not submitted to the jury. The court submitted to the jury only the issue of appellant's guilt of the primary offense, and in the charge withdrew from the jury's consideration the evidence offered to prove the prior offenses and conviction and instructed the jury as follows:

> "You should not mention or discuss in your deliberations such evidence or that portion of the indictment read to you in attempting to charge such prior offenses."

There is no showing of bad faith on the part of the state in alleging or attempting to prove the prior convictions.

In view of such instructions by the court and no enhancement having been made as a result of the jury's verdict, no error is presented. Butler v. State, 271 S.W. 2d 658; Thomas v. State, 353 S.W. 2d 463.

Point of error No. 8 presents appellant's contention that the court erred in overruling his motion for new trial on the ground that he was not present during the voir dire examination of the jury panel on Monday before his case was called for trial on Thursday.

This is a matter which must be presented by a formal bill of exception, and in the absence thereof such contention is not properly before us for review. Beard v. State, 305 S.W. 2d 291; Welch v. State, 373 S.W. 2d 497. We observe, however, that the record shows that

the jury panel reported on Monday, at which time a jury was selected to try another criminal case set for trial on that date. After the jury was selected, the balance of the panel was instructed to return for jury service on Thursday. On Thursday, the panel did return, together with three additional members who had not been examined on Monday. Thereupon, the jury panel was examined in the presence of appellant and the jury selected which served in the case. The record affirmatively reflects that appellant was present during all stages of the trial. If the contention was properly before us for review, no error would be presented.

Finding the evidence sufficient to support the conviction, and no reversible error appearing, the judgment is affirmed.

DICE, Judge

(Delivered December 15, 1965.)

Opinion approved by the court.

APPENDIX "B"

Art 63, *Vernon's Annotated Penal Code of the State of Texas.*

"Art. 63. *Third conviction for felony.*

"Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

APPENDIX "C"

Art. 760e, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1951, 52nd Leg., p. 817, ch. 463.

"Art. 760e. *Motions, exceptions and statement of facts constitute bill of exceptions.*

"All motions for change of venue, motion for new trial based on jury misconduct or that the jury received new evidence during deliberations, exceptions to the indictment or information, motions to set aside an indictment or information, motions to quash a venire or jury panel, or motions for continuance together with any answer thereto, the court's order thereon showing defendant's exception to the ruling, together with a Statement of Facts, where facts were adduced in connection therewith shall constitute the defendant's Bill of Exception, and no formal Bill of Exception need be prepared and filed. Provided, however, that the defendant may file a formal Bill of Exception."

APPENDIX "D"

Art. 759a, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1951, 52nd Leg., p. 819, ch. 465.

"Art. 759a. *Statement of facts and bills of exception*

* * * *

"*Statements of facts relating to motions.*

"Sec. 6. This Statute shall apply to all Statements of Fact relating to any Motion heard in the case, but the facts adduced in connection with any Motion shall be filed with the clerk separately from the facts adduced bearing upon the guilt or innocence of the defendant.

* * * *."

APPENDIX "E"

Art. 1160, *Vernon's Annotated Penal Code of the State of Texas* as amended Acts 1961, Ch. 331, p. 706, 57th Leg.

"Art. 1160. *Assault with intent to murder.*

"Section 1. If any person shall assault another with intent to murder, he shall be confined in the penitentiary for not less than two (2) nor more than twenty-five (25) years, provided that if the jury finds that the assault was committed without malice, the penalty assessed shall be not less than one nor more than three (3) years confinement in the penitentiary; and provided further that in cases where the jury finds such assault was committed without malice but was made with a Bowie knife or dagger as those terms are defined by law, or with any kind or type of a knife, or in disguise, or by laying in wait, or by shooting into a private residence, the penalty shall be doubled."

APPENDIX "F"

Art. 62, *Vernon's Annotated Penal Code of the State of Texas*

"Art. 62. *Subsequent conviction for felony*

"If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

APPENDIX "G"

Art. 847, *Vernon's Annotated Code of Criminal Procedure of the State of Texas.*

"Art. 847. *Presumptions on appeal*

"The Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment, as the law and nature of the case may require. The court shall presume that the venue was proven in the court below; that the jury was properly impaneled and sworn; that the defendant was arraigned; that he pleaded to the indictment; that the court's charge was certified by the judge and filed by the clerk before it was read to the jury, unless such matters were made an issue in the court below, and it affirmatively appears to the contrary by a bill of exceptions approved by the judge of the court below, or proven up by by-standers, as provided by law and duly incorporated in the transcript. In each case by it decided, the Court of Criminal Appeals shall deliver a written opinion, setting forth the reason for such decision."

APPENDIX "H"

Art. 28.01, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1965, 59th Leg.

"Art. 28.01. *Pre-trial*

"Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and the State's attorney, to appear before the court at the time and place stated in the court's order for a conference and hearing. The defendant must be present at the arraignment, and his presence

is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters:

* * * *

"(6) Motions to suppress evidence—When a hearing on the motion to suppress evidence is granted, the court may determine the merits of said motion on the motions themselves, or upon opposing affidavits, or upon oral testimony, subject to the discretion of the court;

* * * *"

APPENDIX "I"

Art. 37.07, *Vernon's Annotated Code of Criminal Procedure of the State of Texas,* as amended Acts 1967, 60th Leg., Ch. 659.

"Art. 37.07. *Verdict must be general; separate hearing on proper punishment.*

"1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

"2. Alternate procedure

"(a) In all criminal cases, other than misdemeanor cases of which the justice court or corporation court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or

innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

"(b) If a finding of guilty is returned it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in capital cases where the state has made it known in writing prior to the trial that it will seek the death penalty, (2) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial begins, and (3) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment. * * *"

APPENDIX "J"

AFFIDAVIT

I, Joe M. Ingram, after being duly sworn, do depose as follows:

On June 17, 1961, I was the duly elected and qualified Judge of the Eleventh Judicial Circuit of the State of Tennessee and as such presided over the Circuit Criminal Court for Maury County, Tennessee. On that date the defendant, James Burgett, charged by three indictments, being No. 6709, 6710 and 6711, with the offense of forgery. Upon being arraigned in open court he was informed that as provided by Tennessee Law, he was entitled to have legal counsel, and that if he could not afford to employ counsel, the court would ap-

point a lawyer to defend him. Whereupon, he waived his right to counsel and went to trial acting as his own counsel.

JOE M. INGRAM
Circuit Judge

THE STATE OF TENNESSEE
COUNTY OF MAURY

Subscribed to and sworn to before me, this the 8th day of September, 1967.

SAM D. KENNEDY
Notary Public

My commission expires Oct. 11, 1970.

Filed in Court of Criminal Appeals Sept. 11, 1967.
Glenn Haynes, Clerk.

AFFIDAVIT

I, Sam D. Kennedy, after being duly sworn, do depose as follows:

That on June 17, 1961, I was duly appointed and qualified Assistant District Attorney General for the Eleventh Judicial Circuit of Tennessee, that Maury County, Tennessee, was a part of my circuit, and that I was the prosecutor for the state in cases No. 6709, 6710, and 6711, wherein James Burgett was defendant upon charges of forgery. I was present in open court at Columbia, Tennessee, upon such date when the defendant was fully informed by the Circuit Judge, Joe M. Ingram, of his right to counsel and do depose that the defendant, James Burgett, did then and there waive his rights to counsel and agreed that he would represent himself.

SAM D. KENNEDY

STATE OF TENNESSEE
COUNTY OF MAURY

Subscribed to and sworn to before me, this the 8th day of September, 1967.

VIRGINIA PATTERSON
Notary Public

My Commission expires July 12, 1971.

Filed in Court of Criminal Appeals Sept. 11, 1967.
Glenn Haynes, Clerk

TABLES OF AUTHORITIES

Cases

Statutes

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 53

JAMES CLEVELAND BURGETT,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

REPLY BRIEF FOR PETITIONER

ARGUMENT

1. The unfair position taken by the State of Texas in Respondent's Brief provides the best possible proof of the necessity for a hearing on the issue of whether a prior conviction is void for denial of the right to counsel. The Supreme Court is asked to find as a matter of fact that petitioner actually waived counsel (Respondent's Brief, p. 10), although a waiver was not contended in either the trial court or the Court of Criminal Appeals or in answer to petitioner's petition. The Supreme Court is asked to make this finding of fact based on two *ex parte* affidavits signed on September 8, 1967, and filed with the Clerk of the Court of Criminal Appeals on September 11, 1967, long after the

record was certified, printed, and filed in this Court. The affidavits, although not part of the record, are offered by the State as conclusive evidence that petitioner waived his right to counsel, even though (1) petitioner's counsel was given no notice, (2) petitioner's counsel was given no opportunity to cross examine the State's witnesses, (3) petitioners was denied the right to confront the witnesses against him, (4) no hearing was held before any judge in order to ascertain the credibility of petitioner who denies that counsel was tendered to him or that he waived counsel. The State's assumption that the Supreme Court will re-open the case for original evidence, presented for the first time in respondent's brief, appears to be so contrary to the Court's practice as to require no answer at all. Under this Court's decision in *Pennsylvania ex rel Hermann* v. *Claudy*, 350 U.S. 116, 123 (1956), the affidavits have no conclusive evidentiary value.

2. The State contends for the first time that petitioner's counsel had a means of challenging the void prior convictions prior to trial. The State represents to this Court that Article 760e and Article 759a § 6 (Respondent's Brief, Appendix C and D) provide authority for this proposition. The statutes on their face do not give any support to this position. These statutes deal with formal requirements for the record on appeal to the Court of Criminal Appeals. The statutes dealing with objections to the indictment do not include a challenge to prior convictions. Vernon's Texas Code of Criminal Procedure, Articles 506, 511, 512 (1948). No cases were cited by the State. With all due deference to the expert criminal lawyers filing the brief on behalf of the State of Texas, the cases cited in Petitioner's Brief for the proposition that defendant could do nothing to prevent this information from coming to the attention of the jury remain unimpeached. The State even concedes that at the

time of petitioner's trial there was no procedure to suppress evidence (Respondent's Brief, p. 10).

The cruel irony, however, of the State's position is that the State wishes to charge petitioner's trial counsel with being negligent or ineffective for failure to invoke what they now say is a known procedure for challenging a void conviction, when the State refused to allow petitioner's counsel to see the evidence prior to trial so that he was denied even an opportunity to make an objection — except in the presence of the jury.

3. As predicted, the State did argue that petitioner shows no harm because he only received a ten year sentence in the State Penitentiary. Justification for this argument, however, comes from surprising directions.

First, it is contended for the first time that petitioner was subject to a twenty-five year automatic penalty because of Article 62, instead of Article 63 under which he was tried. (See Petitioner's Brief, Appendix A, Texas Habitual Criminal Statutes) Under Article 62, the maximum penalty is given when a prior offense is of the same character as the primary offense. For Article 62 to be applicable, the prior and the primary offense must be in substance the same offense. *E.g., Flores* v. *State,* 166 S.W. 2d 706 (Tex. Crim. App. 1942); *Long* v. *State,* 36 Tex. 6 (1871). The State concedes that the Tennessee convictions were not of the same nature as the primary offense and could not be used. The State then contends that the State conviction for burglary is an offense of the same character as assault with intent to murder. This position cannot be maintained, even if the State could induce this Court to decide that the state court trial judge erroneously ruled out the Texas burglary conviction on state law grounds.

Second, and more important, the State claims that no harm is shown because the jury knew or must have known that petitioner was being held in jail or another charge when the crime allegedly occurred. The State concludes, "Under this record, life could have been assessed." (Respondent's Brief, p. 11) This position, in addition to being untenable, is reprehensible. The State is saying that because petitioner was in jail — whether awaiting trial or after trial we do not know — the jury could consider this evidence and assess a life penalty even though a judge charged as a maximum, twenty-five years. This argument is made despite the State's own concession, in another part of the brief, that the maximum penalty which could have been assessed against petitioner was twenty-five years (Respondent's Brief, p. 4)

4. The State now contends that "The State offered to stipulate the prior convictions out of the presence of the jury, but respondent would not agree" (Respondent's Brief, p. 4). Consider the alternative that such an offer would present to petitioner: Either he stipulates to void prior convictions and serves life imprisonment on a finding of guilty, or he exercises his constitutional rights in the presence of the jury and suffers the prejudice that comes when the jury is informed of prior convictions. He is not permitted to challenge the prior convictions outside the presence of the jury; he can only admit them out of the presence of the jury. In other words, the price of an unprejudiced jury is the waiver of his constitutional rights.

CONCLUSION

The judgment of the Court of Criminal Appeals should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 53.—October Term, 1967.

James Cleveland Burgett, Petitioner, v. State of Texas. | On Writ of Certiorari to the Court of Criminal Appeals of Texas.

[November 13, 1967.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioner was convicted of "assault with malice aforethought with intent to murder; repetition of offense." The jury fixed the punishment at 10 years in the Texas State Penitentiary.[1] On appeal, the Texas Court of Criminal Appeals affirmed petitioner's conviction.[2] We granted certiorari, 386 U. S. 931.

Petitioner was charged in a five-count indictment. In the first count the State alleged that he had cut one Bradley with a knife and had stabbed at Bradley's throat with intent to kill. Pursuant to the Texas recidivist statutes,[3] the remaining counts of the indictment consisted of allegations that petitioner had suffered four

[1] The maximum penalty for a first conviction of assault with intent to murder is 25 years; the minimum penalty is two years. Tex. Pen. Code § 1160 (Additional Supp. 1966).

[2] *Burgett* v. *Texas*, 397 S. W. 2d 79 (1966).

[3] The statutes involved here are Articles 62 and 63 of the Tex. Pen. Code (1952).

Article 62 provides: "If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

Article 63 provides: "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

previous felony convictions: a Texas conviction for burglary, and three Tennessee convictions for forgery. If these allegations were found to be true, petitioner would be subject to a term of life imprisonment upon conviction of the offense charged in count one.[4]

Petitioner's counsel filed a pretrial motion to quash the four counts of the indictment referring to the prior convictions for failure to apprise the defense of what the State would attempt to prove.[5] The record is silent as to the court's action on this motion. But when the indictment was read to the jury at the beginning of the trial, before any evidence was introduced, the four counts relating to the prior convictions were included.

During the course of the trial, while the jury was present, the State offered into evidence a certified copy of one of the Tennessee convictions. The conviction read in part, "Came the Assistant Attorney General for the State and the defendant in proper person and without counsel." Petitioner's counsel objected to the introduction of the record on the ground that the judgment on its face showed that petitioner was not represented by counsel in violation of the Fourteenth Amendment. There was no indication in the record that counsel had been waived. The court stated that it would reserve ruling on the objection, apparently to give the State an opportunity to offer any of the other convictions into evidence. The State then offered a second version

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[4] Tex. Pen. Code, Art. 63 (1952).

[5] In petitioner's amended motion for a new trial, which was denied by the court, he explained that the purpose of the pretrial motion was "so that defendant could establish their (the previous convictions alleged for enhancement) admissibility before they were read into the record in the presence of the jury; same reading into the record in the presence of the jury was prejudicial to defendant herein."

of the same Tennessee conviction which stated that petitioner had appeared "in proper person" but did not contain the additional words "without counsel." This second version also stated that "After said jury had heard the evidence, argument of counsel, and the charge of the court, they retired to consider of their verdict." It is not clear, however, whether "counsel" was being used in the singular or plural, and in any event no explanation was offered for the discrepancy between the two records. Petitioner's counsel objected to this second version on the same ground. The court again reserved its ruling.

The State then offered into evidence a certified copy of the indictment in the prior Texas case. Petitioner's counsel indicated he had no objection, and that record was received into evidence. Thereafter, testimony was offered concerning the judgment and sentence in the prior Texas case. After some testimony had been given, the jury was excused and the hearing continued out of their presence. At the conclusion of the hearing, petitioner's attorney objected that the Texas judgment was void on its face under state law. The court sustained that objection, and the record of the Texas conviction was stricken from evidence. At the same time, the court sustained petitioner's objection to the first version of the Tennessee conviction; but overruled the objection to the second version of the same conviction. The jury was then recalled and testimony was heard on the substantive offense charged. The next reference to the prior convictions was when the court instructed the jury not to consider the prior offenses [6] for any purpose whatsoever in arriving at the verdict.

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[6] The court apparently withdrew consideration of the prior convictions from the jury since only the record of the one prior Ten-

to say that the instructions to disregard it [7] made the constitutional error "harmless beyond a reasonable doubt" within the meaning of *Chapman* v. *California*, 386 U. S. 18.

Our decision last Term in *Spencer* v. *Texas*, 385 U. S. 554, is not relevant to our present problem. In *Spencer* the prior convictions were not presumptively void. Moreover, the contention was that the guilt phase of the trial was prejudiced by the introduction of the evidence of prior crimes. As the Court noted, "[i]n the procedures before us, no specific federal right—such as that dealing with confessions—is involved; reliance is placed solely on a general 'fairness' approach." In this case, however, petitioner's right to counsel, a "specific federal right," is being denied anew. This Court cannot permit such a result unless *Gideon* v. *Wainwright* is to suffer serious erosion.

Reversed.

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[7] See, *e. g.*, *Boyd* v. *United States*, 142 U. S. 450; *United States* v. *Clarke*, 343 F. 2d 90 (C. A. 3d Cir. 1965). Cf. *Waldron* v. *Waldron*, 156 U. S. 361, 383; *Throckmorton* v. *Holt*, 180 U. S. 552; *Lawrence* v. *United States*, 375 F. 2d 434 (C. A. 10th Cir. 1966); *United States* v. *De Dominicis*, 332 F. 2d 207 (C. A. 2d Cir. 1964).

What Mr. Justice Jackson said in *Krulewitch* v. *United States*, 336 U. S. 440, 453 (concurring opinion), in the sensitive area of conspiracy is equally applicable in this sensitive area of repetitive crimes, "The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction."

SUPREME COURT OF THE UNITED STATES

No. 53.—October Term, 1967.

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[November 13, 1967.]

Mr. Chief Justice Warren, concurring.

I am in full agreement with the opinion of the Court and the reasons stated therein for reversing the conviction in this case. However, in view of the terse dissent entered by my Brother Harlan, I feel constrained to add some observations of my own.

The dissent refers to the Court's decision in *Spencer* v. *Texas*, 385 U. S. 554, and the entire thrust of the dissent is reminiscent of that decision of last Term which placed this Court's stamp of approval on the Texas recidivist procedures from which this case evolves. The dissent reminds us that "[w]e do not sit as a court of errors and appeals in state cases." I would not disagree with that statement as an abstract proposition. But we are not dealing with abstracts in this case. We are dealing with a very real denial of a state criminal defendant's rights as guaranteed by the Federal Constitution. We are also told by the dissent that "this case shows no prosecutorial bad faith or intentional misconduct." But this misses the mark. We are not limited in our review of constitutional errors in state criminal proceedings to those errors which flow from "prosecutorial bad faith or intentional misconduct."[1] Our concern is with the effect

[1] Prosecutorial bad faith, of course, it not an irrelevant element in our review of state criminal convictions. It can often make even

Petitioner's motion for a new trial was denied. In the Court of Criminal Appeals, petitioner argued, *inter alia*, that the court erred in permitting counts two through five of the indictment to be read to the jury at the beginning of the trial, and in failing to sustain petitioner's objection to the admission into evidence of the second version of the Tennessee conviction. The Court of Criminal Appeals held that since petitioner had not suffered the enhanced punishment provided by the recidivist statutes, and since the instruction to disregard the prior offenses had been given, no error was presented.

We do not sit as a court of criminal appeals to review state cases. The States are free to provide such procedures as they choose, including rules of evidence, provided that none of them infringes a guarantee in the Federal Constitution. The recent right to counsel cases, starting with *Gideon* v. *Wainwright*, 372 U. S. 335, are illustrative of the limitations which the Constitution places on state criminal procedures. Those limitations sometimes touch rules of evidence.

The exclusion of coerced confessions is one example. *Chambers* v. *Florida*, 309 U. S. 227.

The exclusion of evidence seized in violation of the Fourth and Fourteenth Amendments is another. *Mapp* v. *Ohio*, 367 U. S. 643.

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nessee conviction for forgery had been accepted. Thus, Article 63 could not be applied to petitioner. Further, since forgery could not be considered as an offense of the "same nature" as assault with intent to murder, Article 62 would not be applicable. See n. 3, *supra*.

The State apparently did not attempt to introduce the records of the other two Tennessee convictions for forgery because the indictment showed that all of the convictions occurred on the same date. To invoke the provisions of Article 63, each succeeding conviction must be subsequent in time to the previous conviction—both with respect to commission of the offense and to conviction. *Cowan* v. *State*, 172 Tex. Crim. 183, 355 S. W. 2d 521 (1962).

Still another is illustrated by *Pointer* v. *Texas*, 380 U. S. 400. In that case we held that a transcript of a preliminary hearing had to be excluded from a state criminal trial because the defendant had no lawyer at that hearing, and did not, therefore, have the opportunity to cross-examine the principal witness against him who since that time had left the State. The exclusionary rule that we fashioned was designed to protect the privilege of confrontation guaranteed by the Sixth Amendment and made applicable to the States by the Fourteenth.

The same result must follow here. *Gideon* v. *Wainwright* established the rule that the right to counsel guaranteed by the Sixth Amendment was applicable to the States by virtue of the Fourteenth, making it unconstitutional to try a person for a felony in a state court unless he had a lawyer or had validly waived one. And that ruling was not limited to prospective applications. See *Doughty* v. *Maxwell*, 376 U. S. 202; *Pickelsimer* v. *Wainwright*, 375 U. S. 2. In this case the certified records of the Tennessee convictions on their face raise a presumption that petitioner was denied his right to counsel in the Tennessee proceedings, and therefore that his conviction was void. Presuming waiver of counsel from a silent record is impermissible. *Carnley* v. *Cochran*, 369 U. S. 506. To permit a conviction obtained in violation of *Gideon* v. *Wainwright* to be used against a person either to support guilt or enhance punishment for another offense (see *Greer* v. *Beto*, 384 U. S. 269) is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright* is inherently prejudicial and we are unable

of those errors, whether well-intentioned or not,[2] on the constitutionality protected right of a criminal defendant to a fair and impartial trial.

This case is a classic example of how a rule eroding the procedural rights of criminal defendants on trial for their life or liberty can assume avalanche proportions, burying beneath it the integrity of the fact-finding process. In *Spencer*, the Court approved a procedure whereby a State, for the sole purpose of enhancing punishment, includes in the indictment allegations of prior crimes which are read to the jury and enters evidence at trial of those prior crimes, no matter how unrelated they might be to the charge on which the defendant is being tried. The rule adopted in *Spencer* went so far as to allow the State to enter evidence on the prior crimes even though a defendant might be willing to stipulate the earlier convictions. In this case, that harsh rule was expanded to a degree close to barbarism.

In addition to charging the petitioner with the principal crime of "assault with malice aforethought with intent to murder," the indictment alleged four prior convictions, one in Texas and three in Tennessee. Despite the efforts of the petitioner's attorney to quash those

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more intolerable errors which demand correction in this Court. See, *e. g.*, *Miller* v. *Pate*, 386 U. S. 1; *Napue* v. *Illinois*, 360 U. S. 264; *Mooney* v. *Holohan*, 294 U. S. 103.

[2] The dissent is not alone in viewing this case solely in terms of the prosecutor's good or bad faith. The Texas Court of Criminal Appeals disposed of the petitioner's objection to the use of the prior void convictions at trial with the cryptic observation that "[t]here is no showing of bad faith on the part of the state in alleging or attempting to prove the prior convictions." Boswell tells us that Dr. Johnson once observed that "Hell is paved with good intentions." Boswell, Life of Samuel Johnson 257 (Great Books ed. 1952). If the good-faith view of this case should prevail, then surely this petitioner's road to prison would be paved with the same good intentions.

portions of the indictment referring to the prior crimes, the entire indictment was read to the jury at the start of the petitioner's one-day trial. The prosecutor then proceeded to offer evidence of the prior convictions. The petitioner's attorney objected to evidence of one Tennessee conviction because a certified copy of that conviction showed that the petitioner had not been represented by counsel. The trial judge reserved his ruling on the objection. The prosecution next offered a second version of that same Tennessee conviction which omitted any reference to the absence of counsel but which did not show a waiver of counsel. The petitioner's attorney again objected and the trial judge again reserved his ruling. The prosecutor then offered into evidence a certified copy of the indictment in the prior Texas case, and it was received without objection. All this occurred in the presence of the jury. However, when the petitioner's attorney objected to evidence concerning the judgment and sentence in the prior Texas case, the jury was excused and testimony was taken out of the presence of the jury. At the close of that evidence and before the jury returned, the trial judge ruled that the prior Texas conviction was void under state law. In addition, the trial judge sustained the objection to the first version of the Tennessee conviction but overruled the objection to the second version of the same conviction.[3] The jury then returned and the trial continued. The next the jury was to hear of the prior convictions was a brief instruction from the trial judge advising the jurors not to consider the prior crimes for any purpose. The jury was never told, however, that two of the prior convictions

[3] The record is silent concerning the second and third Tennessee convictions alleged in the indictment, and the prosecution apparently did not offer any evidence on those convictions. However, the jury had been made aware of the prior crimes when the indictment was read at the start of the trial.

charged were void and that the prosecution had failed to offer testimony on the validity of the other prior crimes charged in the indictment.

Thus, the jury went into its deliberations knowing that the petitioner had been convicted and imprisoned for four prior felonies, although not one had been proven at the trial. To expect that the jury could wipe this from its memory and decide the petitioner's guilt only on the basis of the evidence of assault is to place too much faith in a jury's ability to detach itself from reality. This is particularly true since the trial judge gave the jurors not the slightest clue as to why matters which consumed so much time at trial were suddenly being removed from their consideration.

To suggest that such a procedure accords a man charged with a crime due process is beyond belief. This Court has reversed convictions in other cases based on unfair influences on juries which must be deemed minor when compared to the pervasive prejudice in this case. Not long ago we ruled that a defendant was denied due process when a court bailiff remarked in the presence of the jurors, "Oh that wicked fellow, he is guilty"; and, "If there is anything wrong [in the verdict] the Supreme Court will correct it." *Parker* v. *Gladden*, 385 U. S. 363. We also reversed a murder conviction because two prosecution witnesses were deputy sheriffs who had been assigned to accompany the jury while it was sequestered. *Turner v. Louisiana*, 379 U. S. 466.[4] If these transgressions offend constitutional standards of fairness, can it be doubted that the petitioner's trial was stripped of all

[4] I do not mean to express any disapproval of our decisions in *Parker* and *Turner*. I joined both of those opinions and I have no doubt the practices condemned in those cases were at odds with settled principles of due process of law. However, it follows *a fortiori* from those decisions that we are presented in this case with a violation of due process.

vestiges of due process when the jurors were told of his prior void convictions and the error was not explained to them?

This case is the frightful progeny of *Spencer* and of that decision's unjustified deviation from settled principles of fairness. Today we have placed a needed limitation on the *Spencer* rule, but nothing except an outright rejection would truly serve the cause of justice.

SUPREME COURT OF THE UNITED STATES

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[November 13, 1967.]

Mr. Justice Harlan, whom Mr. Justice Black and Mr. Justice White join, dissenting.

The record in this case shows no prosecutorial bad faith or intentional misconduct. To the extent that the prosecutor contemplated the use of prior convictions in a one-stage recidivist trial, his right to do so is of course established by *Spencer* v. *Texas*, 385 U. S. 554, decided only last Term. The fact that the prior convictions turned out to be inadmissible for other reasons involves at the most a later corrected trial error in the admission of evidence. We do not sit as a court of errors and appeals in state cases, and I would affirm the judgment of the state court.